IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably determined that a nurse's direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care does not make the nurse a "supervisor" under Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11).

2. Whether the Board permissibly requires the party who alleges that an employee is excluded from the Act's protections as a supervisor to bear the burden of proving the individual's supervisory status.

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-11a, is reported at 987 F.2d 1256. The decision and order of the National Labor Relations Board and the decision of the administrative law judge, App., *infra*, 12a-76a, are reported at 306 N.L.R.B. No. 11.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), provides in relevant part:

> The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor * * *.

Section 2(11) of the Act, 29 U.S.C. 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(12) of the Act, 29 U.S.C. 152(12), provides in relevant part:

> The term "professional employee" means—(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes * * *.

STATEMENT

This case involves the determination of the National Labor Relations Board (Board) that the nurses employed by respondent are not supervisors, who are excluded from the protections that the Act affords to employees; the Board thus held that respondent violated the Act by disciplining and discharging certain nurses for engaging in concerted activity protected by the Act. The court of appeals vacated the Board's order, holding that the Board's test for determining when a nurse occupies supervisory status, as well as the Board's allocation of the burden of proof on that issue to the party asserting supervisory status, conflict with the Act.

1. Respondent owns and operates approximately 138 nursing homes in 27 States. App., *infra*, 32a-33a. This case involves the Heartland nursing home in Urbana, Ohio (Heartland). *Id.* at 33a. Heartland has an administrator and several departments. The nursing department includes a director of nursing (DON) and an assistant director of nursing (ADON), both of whom are supervisors. It also includes 9 to 11 staff nurses and 50 to 55 nurses' aides. Some of the staff nurses are registered nurses, while others are licensed practical nurses, but all have essentially the same duties. *Id.* at 34a-35a & n.5.

Heartland is a 100-bed facility, divided into two wings. App., *infra*, 34a. One staff nurse is always on duty in each wing, *id.* at 35a; the nurses work 12-hour shifts, from 7:00 a.m. to 7:00 p.m. or vice

versa. *Id.* at 37a. The nurses' aides work eight-hour shifts, beginning at 7:00 a.m., 3:00 p.m., and 11:00 p.m. *Ibid.* There are six aides in each wing during the first shift, four in each wing during the second shift, and two in each wing (plus a fifth aide who spends half the shift in each wing) on the third shift. *Ibid.* The administrator, the DON, and the ADON work only during the day and on weekdays, *id.* at 46a, but the administrator and the DON are always on call, and nurses call them when non-routine matters arise. *Id.* at 47a.

The duties of the aides off of the resident wings are assigned by Heartland's administrators. On the wings, the day-shift nurses tell each aide which residents are to be cared for by that aide. In making such assignments, the nurses follow old patterns that have evolved over time, and generally allow aides to continue working with the same residents if the aides so desire. The night-shift nurses arrive four hours after the evening-shift aides have begun work, and they do not change the aides' assignments. App., *infra*, 38a-39a. After aides are assigned to patients, nurses have little role in directing the performance of their duties. *Id.* at 40a. Each of the aides can do the work of any other aide. *Id.* at 38a.

If one wing is understaffed due to the absence of one or more aides, the nurse on that wing may ask the nurse on the other wing to transfer an aide. The aides are usually allowed to decide which of them will change wings. App., *infra*, 37a-38a. A nurse may also obtain a replacement aide by telephoning the aides until locating one who is willing to come in; the nurse has no authority to order an off-duty aide to report to work. *Id.* at 41a. Alternatively, the

nurse may see if an aide wishes to remain on duty after the end of the aide's shift on overtime, but the nurse cannot insist that any aide do so. *Ibid.* The nurses otherwise have no authority to grant overtime. Nor may the nurses allow an aide to be absent for personal reasons. *Id.* at 42a. Nurses initial time cards showing an aide's overtime or late arrival and routinely report problems, such as absences, to Heartland's administrator or DON. *Id.* at 42a, 44a.

In case of misconduct or poor job performance by an aide, a nurse fills out an "employee counseling form" and delivers it to the administrator or the DON. App., *infra*, 43a-44a. Such forms remain in the aides' personnel files, but have never resulted in disciplinary action being taken against an aide. The nurses never discipline the aides or threaten to do so, and they seldom recommend that an aide be disciplined. *Id.* at 44a-45a.

Heartland gives each employee a performance appraisal after the employee's probationary period and annually thereafter. Initially, the nurses did not participate at all in the evaluation process. Beginning about one month before respondent's actions at issue here, however, the nurses began to fill out parts of the evaluation forms for some aides, rating the aides in several categories. The nurses were specifically told not to give any aide an overall rating or to make a recommendation with respect to continued employment. The nurses deliver the forms to their superiors and do not participate in the separate meetings between each aide and the administrator or DON, at which the evaluations are discussed. There is nothing to indicate that the nurses' role in the evaluation process has any impact on the aides' jobs. The aides'

pay levels depend on seniority, and Heartland does not promote them. App., *infra*, 43a, 45a-46a.

2. The Board's General Counsel issued a complaint alleging that respondent violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by issuing disciplinary warnings to several staff nurses, and later discharging three of them, for engaging in concerted activity designed to improve their working conditions and those of other employees.[1] Respondent contended that its actions with respect to the nurses were taken for legitimate reasons, and, in any event, the nurses were "supervisors" under Section 2(11) of the Act, 29 U.S.C. 152(11), and were therefore not entitled to the protections of the Act. App., *infra*, 33a.

a. The administrative law judge (ALJ) determined that Heartland's nurses are not "supervisors" within the meaning of Section 2(11) of the Act. App., *infra*, 33a-49a. The ALJ acknowledged that the nurses have some authority over and responsibilities regarding the nurses' aides, *id.* at 37a, but he concluded that those responsibilities do not make them statutory supervisors. He noted that the day-shift, but not the night-shift, nurses are involved in assigning the aides to care for residents, *id.* at 38a-39a, but found that the nurses' responsibilities in that regard did not require the use of "independent judgment" as that phrase is used in Section 2(11). App., *infra*, 39a-40a. The ALJ further concluded that the nurses'

[1] Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1). Section 7 of the Act, 29 U.S.C. 157, grants employees the right, *inter alia*, to engage in "concerted activities for the purpose of * * * mutual aid or protection."

direction of the work of the aides does not amount to "responsibly * * * direct[ing]" the aides "in the interest of the employer," since "the nurses' focus is on the well-being of the residents rather than of the employer." *Id.* at 40a. "[T]he direction the nurses give to the aides," he added, "is closely akin to the kind of directing done by leadmen or straw bosses, persons who Congress plainly considered to be 'employees.'" *Ibid.*

The ALJ also found that the nurses have no authority to require aides to work overtime or to request aides to work overtime because of the press of work. They can only offer overtime assignments to aides who are off duty (or scheduled to go off duty) in order to fill in for absent colleagues. Similarly, the nurses' authority to allow aides to leave early is limited to instances of sickness. App., *infra*, 41a-43a.

The ALJ further concluded that the nurses have no role in rewarding or promoting aides because the aides' pay level is not tied to performance, but "depends solely on their seniority." App., *infra*, 43a. He also found that the nurses have no real role in disciplining or discharging aides because the nurses' criticism of aides' performance does not affect their job status. Although the nurses report problems about an aide's work to the administrator or DON and may sit in on disciplinary conferences, the nurses do not themselves penalize, threaten to penalize, or (with minor exceptions) recommend penalties for the aides. *Id.* at 43a-45a.

The ALJ acknowledged that the nurses are the "senior personnel present" during weekends and the evening and night shifts. App., *infra*, 46a. He noted, however, that the administrator and the DON are always on call and are in fact often called when the nurses have to deal with a non-routine matter. *Id.*

at 47a. The ALJ further examined the ratio of supervisors to employees (depending on whether the nurses are considered supervisors or not), *id.* at 47a-48a, but concluded that specific ratios are not dictated by the Act, and that, "analyzing the situation at Heartland on the basis of the criteria that are spelled out in Section 2(11), the nurses simply do not possess supervisory authority."[2] *Id.* at 48a.

b. The Board affirmed the ALJ's determination that the nurses are employees, not statutory supervisors. App., *infra*, 13a n.1. The Board clarified, however, that the ALJ had erred in his assumption, *id.* at 44a & n.7, that the General Counsel had the burden of proving that the nurses are not supervisors. The Board stated that "[t]he party alleging supervisory status * * * bears the burden of proving an individual is a supervisor." *Id.* at 13a n.1. With respect to that issue, the Board indicated that it continued to disagree with the Sixth Circuit's statement in *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (1987), that "[t]he Board always has the burden of coming forward with evidence showing that employees are not supervisors * * *." App., *infra*, 13a n.1, citing *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390 (1989). The Board added that, in any event, "the preponderance of the evidence [in this case] establishes that the nurses are employees."[3] App., *infra*, 13a n.1.

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[2] The ALJ went on to find that respondent's issuance of certain disciplinary warnings violated the Act, but that respondents had not violated the Act by issuing other disciplinary warnings and by discharging three nurses for engaging in protected activity. App., *infra*, 49a-72a.

[3] The Board went on to reverse the ALJ's holdings (see note 2, *supra*) that respondent had not violated the Act with respect to the disciplinary actions and discharges of the nurses at issue. App., *infra*, 17a-27a. Those determinations of the Board are not at issue here.

3. Respondent filed a petition for review, and the court of appeals vacated the Board's order. App., *infra*, 1a-11a. With respect to the Board's test for determining whether nurses are supervisors, the court of appeals observed that "there is a history of conflict" between the Board's approach and decisions of the Sixth Circuit.

> The Board has always taken the position that a nurse is not a supervisor when her conduct is in the furtherance of the patient's interest. The Board maintains that nurses are working for the patient's interests, not the interests of their employers. Therefore, the Board maintains that nurses should not be considered to be supervisors under the Act.

Id. at 8a. The court noted, however, that in *NLRB* v. *Beacon Light Christian Nursing Home, supra*, and *Beverly California Corp.* v. *NLRB*, 970 F.2d 1548 (6th Cir. 1992), it had held that "if a nurse's actual functions performed met the statutory criteria for being a supervisor, then the nurse would not be disqualified because he/she was engaged in 'mere patient care.'" App., *infra*, 8a. The court also noted that it has rejected the Board's view that the burden to establish that an individual is a supervisor rests on the party who asserts it, *id.* at 6a, 8a; instead, the court places the burden on the Board to establish "non-supervisory status." *Id.* at 10a.

Having rejected the Board's legal determinations, the court of appeals held that "the duties of a staff nurse at Heartland nursing home clearly require both assigning aides to specific tasks and directing

the operation of the aides, as well as the entire nursing home, when the Director of Nursing or his/her assistant is not present." App., *infra*, 10a. The court thus concluded that the staff nurses had the authority to "assign" and "responsibly direct" aides within the meaning of Section 2(11) of the Act. App., *infra*, 9a-10a. Because of its finding that the nurses are statutory supervisors, the court of appeals vacated the Board's order without reaching the issue of whether respondent committed unfair labor practices. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

The Board has long held that a nurse's direction to less-skilled employees, in the exercise of professional judgment and incidental to the nurse's treatment of patients, is not, by itself, sufficient to make the nurse a "supervisor" within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11). Further, the Board has prescribed, as a procedural matter, that the party alleging that an individual is a supervisor, and consequently excluded from the protections of the Act, bears the burden of proving that claim. For the third time, the court of appeals has rejected the Board's position on these issues, thereby deepening a split in the circuits on the test for determining the supervisory status of nurses and the allocation of the burden of proof on the issue of supervisory status (whether of nurses or of other employees). Both questions are recurring ones that are important to the proper administration of the Act. In order to resolve the double conflict presented by the decision in this case, and to reaffirm that judicial deference is owed to the Board's interpretations of the Act where, as here, its positions are rational and consistent with the statute, this Court's review is warranted.

1. a. Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and hence from the Act's protections, any "supervisor." "Supervisor" is defined in Section 2(11), 29 U.S.C. 152(11), as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

By its terms, that definition calls for line-drawing by the Board, because the Board must determine what constitutes action "in the interest of the employer" and what activities should be classified as mere routine, rather than the exercise of "independent judgment."

Moreover, the Act also covers professional employees, a category that, as defined in Section 2(12), 29 U.S.C. 152(12), covers employees who have duties requiring the "consistent exercise of discretion and judgment." Because most professionals have some supervisory responsibilities in the sense of directing another's work, the Board must distinguish between supervision in the statutory sense and work direction by a professional employee that is merely an exercise of the customary duties of that person's profession. The failure to draw such a distinction would negate Congress's intention to afford the protection of the Act to professional employees.

In light of the interplay of the Act's definitions and its policies with respect to the exclusion of supervisors and managers from employee status, the Board has held that "employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty[;] [o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *NLRB* v. *Yeshiva University*, 444 U.S. 672, 690 (1980) (footnote omitted). In *Yeshiva*, the Court referred to the Board's application of those principles in a variety of contexts, including cases in the health care field, and concluded that those "decisions accurately capture the intent of Congress."[4] *Ibid.*

The Board has long applied those principles in the health care field.[5] For example, in *Doctors' Hospital*

[4] The Court cited the Board's decisions holding that architects and engineers functioning as project captains for work performed by teams of professionals are employees, despite their planning responsibility and authority to direct and evaluate team members, as well as the Board's decision in *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950, 951-952 (1970), enforced, 489 F.2d 772 (9th Cir. 1973), see pp. 12-13, *infra*, which involved nurses. *Yeshiva*, 444 U.S. at 690 n.30.

[5] The Board first asserted jurisdiction over private proprietary hospitals and nursing homes in 1967. *Butte Medical Properties*, 168 N.L.R.B. 266 (1967) (overruling *Flatbush General Hospital*, 126 N.L.R.B. 144 (1960)); *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967). The National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, extended the Board's jurisdiction to the employees of non-profit health care facilities. See *American*

of Modesto, Inc., 183 N.L.R.B. 950 (1970), enforced, 489 F.2d 772 (9th Cir. 1973), the Board found that a hospital's registered nurses were not supervisors although they directed other, less-skilled employees with respect to the work to be performed for patients and saw that such work was done. The Board explained that the nurses' "daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their Employer." 183 N.L.R.B. at 951. The Board distinguished *Sherewood Enterprises, Inc.*, 175 N.L.R.B. 354 (1969), in which it had found the same employer's floor nurses to be supervisors, "because, *in addition to* performing their professional duties and responsibilities, [the floor nurses] also possessed the authority to make effective recommendations which affected the job status and pay of the employees working on their wings."[6] 183 N.L.R.B. at 951-952.

Hospital Ass'n v. *NLRB*, 111 S. Ct. 1539, 1545 (1991). In the Board's rulemaking on appropriate bargaining units in acute care hospitals, which this Court upheld in *American Hospital Ass'n, supra*, the Board determined that one appropriate bargaining unit would be a unit consisting of "[a]ll registered nurses." 29 C.F.R. 103.30(a)(1).

[6] The Board applies its approach to determining supervisory status both to registered nurses (who are "professional" employees) and to licensed practical nurses (who are "technical" employees). Licensed practical nurses may not be included in the same bargaining unit with registered nurses absent the latter's consent, see *Presbyterian Medical Center*, 218 N.L.R.B. 1266, 1267 (1975); but the Board treats licensed practical nurses in the same way as it treats registered nurses for the purpose of determining supervisory status where, as here, see p. 3, *supra*, they have the same duties as

In enacting the National Labor Relations Act Amendments of 1974, see note 5, *supra*, Congress indicated its approval of the Board's approach to determining supervisory status. In bringing private nonprofit hospitals under the Act, both the Senate and House Committees rejected an amendment that would have excluded health care professionals from the definition of supervisor in Section 2(11) on the ground that it was unnecessary in light "of existing Board decisions."

> [T]he Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); see also H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974) (same). Each Committee added that it "expects the Board to continue evaluating the facts of each case in this manner when making its determinations." *Ibid.*

This Court has noted that "Congress expressly approved in 1974" the Board's approach in the health care field of asking "in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Yeshiva*, 444 U.S. at 690 n.30, citing S. Rep. No. 766, *supra*, at 6. The Board has consistently followed that approach in determining the

registered nurses. See *Passavant Health Center*, 284 N.L.R.B. 887, 892 (1987).

supervisory status of health care professionals, such as nurses.[7]

b. The Board's rule—that a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised "in the interest of the employer" within the meaning of Section 2(11) of the Act—is "rational and consistent" with the statute; accordingly, it is "entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990).[8] In refusing to defer to the Board's approach to determining supervisory status, and instead imposing

[7] See, *e.g.*, *Presbyterian Medical Center*, 218 N.L.R.B. 1266, 1268 (1975) (registered nurses who serve as charge nurses and as team leaders are not statutory supervisors because "their duties are generally limited to giving directions in the performance of their professional duties"); *Wing Memorial Hospital Ass'n*, 217 N.L.R.B. 1015, 1016-1017 (1975) (registered nurse, who "controls" operating room, recovery room, and central supply room, is a statutory supervisor because she evaluates, schedules, and transfers employees, and makes effective recommendations about job applicants after interviewing them); *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 192 (1976) (head nurses and their assistants not statutory supervisors, since they "perform duties and functions predominantly in the 'exercise of professional judgment' incidental to their treatment of patients" and do not have "the authority to make effective recommendations with respect to the hiring, firing, transfer, or discipline of subordinates").

[8] As this Court has noted, the Board has "a large measure of informed discretion" in determining when the "authority 'responsibly to direct' the work of others" requires a finding of supervisory status. *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962), quoting *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961).

its own approach on the Board, the court of appeals erred.

The court of appeals has asserted that nurses necessarily act "in the interest of the employer" when they direct their subordinates' delivery of health care, because it is "self-evidently in the best interest of the employer to try to do a superior job of serving the needs and interests of the employer's customers." *Beverly California Corp.* v. *NLRB*, 970 F.2d at 1553; *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d at 1079; see App., *infra*, 8a-9a (relying on those cases). The Board's rule, however, does not imply that the interest of a nurse in serving the needs of patients conflicts with the employer's business goals. *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390, 395 (1989). Rather, the Board's rule recognizes that if coincidence of interests so defined were the only factor considered, it would swallow up the Act's coverage of professional employees, for "most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on."[9] Accordingly, the Board has drawn a reasonable distinction between a nurse's direction of aides that is incidental to the delivery of patient care, and the nurse's possession of authority over personnel, such as the authority to affect the job status or pay of aides. Only in the latter case is the nurse acting "in the interest of the employer" as that phrase is used in Section 2(11). *Ohio Masonic Home, Inc.*, 295 N.L.R.B. at 395, citing *Beverly Manor Convalescent Centers*, 275 N.L.R.B. 943, 947 (1985).

[9] *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).

If the court of appeals had not substituted its construction of the Act for the Board's, the court would have sustained the Board's conclusion that the nurses at issue are not supervisors. The factual findings of the ALJ, adopted by the Board, establish that the nurses' assignment and direction of the aides is incidental to the nurses' delivery of patient care; the nurses possess no authority to affect the job status or pay of the aides. See pp. 3-6, *supra*.

c. The Board's approach to determining whether nurses constitute supervisors has been the subject of extensive litigation. Apart from the Sixth Circuit, the courts of appeals that have squarely addressed the issue have endorsed the Board's position that a nurse's direction of an aide's delivery of patient care does not amount to supervisory conduct within the meaning of Section 2(11).

For example, in *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1468 (7th Cir. 1983), the court of appeals upheld the Board's finding that certain licensed practical nurses were not supervisors when, in directing the work of aides, they exercised "a professional judgment as to the best interests of the patient rather than a managerial judgment as to the employer's best interests." In a subsequent case, the Seventh Circuit acknowledged that the Sixth Circuit's decision in *Beacon Light Christian Nursing Home* is "in considerable but unacknowledged tension with our decisions," because it overlooks the fact that "[s]upervision exercised in accordance with professional rather than business norms is not supervision within the meaning of [Section 2(11)], for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the [employer's] profit-maximizing objectives." *Chil-*

dren's Habilitation Center, Inc. v. *NLRB*, 887 F.2d 130, 134 (7th Cir. 1989).[10]

Decisions from other circuits have also sustained the Board's approach. In *Misericordia Hospital Medical Center* v. *NLRB*, 623 F.2d 808, 816-817 (2d Cir. 1980), the court upheld the Board's finding that a head nurse was not a supervisor when her "authority was primarily exercised in providing patient care, not in supervising employees on behalf of management"; her directions to other employees were "incidental to her professional duty to treat patients"; and she "lacked real authority to make independent decisions not involving patient welfare." In *NLRB* v. *Walker County Medical Center, Inc.*, 722 F.2d 1535, 1542 (11th Cir. 1984), the court noted that the nurses in question "engaged primarily in direct patient care" and were not supervisors, because they were "not responsible for major personnel decisions, such as hiring, firing, transferring, and disciplining employees." And in *Waverly-Cedar Falls Health Care Center, Inc.* v. *NLRB*, 933 F.2d 626, 630-631 (8th Cir. 1991), the court upheld the Board's nonsupervisory determination, quoting extensively from *Res-Care*.[11] See also *NLRB* v. *St. Francis Hospital of*

[10] Although the Seventh Circuit has "emphasized" to a greater degree than the Board "the ratio of supervisory to nonsupervisory employees under the competing positions of the parties," *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d at 132, that court, in contrast to the Sixth Circuit, has correctly accepted the Board's focus on whether an employee is "acting in accordance with professional norms" in evaluating the issue of supervisory status. *Id.* at 131.

[11] The Third Circuit has recently enforced, by unpublished judgment order, the Board's determination that certain nurses supervising home-care aides are not statutory supervisors,

Lynwood, 601 F.2d 404, 420 (9th Cir. 1979).[12]

The Sixth Circuit's repeated rejection of the Board's test for determining whether a nurse is a statutory supervisor prevents uniform administration of the Act on a significant issue of coverage. There is no likelihood that the courts of appeals will reach agreement on this issue absent this Court's intervention.

2. The court of appeals' holding that the Board has the burden of proving that an employee is not a supervisor also raises an important issue in the administration of the Act. Moreover, the court's holding conflicts with the decisions of other courts of appeals which have, both within and outside of the

Visiting Homemaker & Health Services, Inc. v. *NLRB*, Nos. 92-3278 & 92-3320 (Feb. 11, 1993), enforcing 307 N.L.R.B. No. 90 (May 13, 1992), and a petition for a writ of certiorari seeking review of that holding is pending in this Court. *Visiting Homemaker & Health Services, Inc.* v. *NLRB*, petition for cert. pending, No. 92-1799 (filed May 11, 1993).

[12] The position of the Fourth Circuit is unclear. In *NLRB* v. *St. Mary's Home, Inc.*, 690 F.2d 1062, 1066-1068 (4th Cir. 1982), the court indicated its approval of the Board's legal test, while finding on the facts of that case that the nurse at issue was a supervisor because her duties were the same as those of another nurse whom the Board had found to be a supervisor. In a recent unpublished decision, however, the Fourth Circuit acknowledged that "other circuits, on similar facts, have found various categories of nurses, including [licensed practical nurses], to be 'employees,'" but concluded that it was bound by *St. Mary's* and rejected the Board's finding that the licensed practical nurses at issue were not supervisors. *Beverly California Corp.* v. *NLRB*, Nos. 92-1068 & 92-1205 (Sept. 11, 1992), denying enforcement to 303 N.L.R.B. No. 20 (May 28, 1991).

health care field, approved the Board's allocation rule.[13]

The Board has ruled that the burden of proof of supervisory status falls "on the party alleging that such status exists." *St. Alphonsus Hospital*, 261 N.L.R.B. 620, 624 (1982), enforced, 703 F.2d 577 (9th Cir. 1983) (Table). The Board's rule applies regardless of which party makes the assertion; thus, an employer must carry the burden when it defends against an unfair-labor-practice complaint by claiming that an individual is a supervisor, see, *e.g.*, *Schnuck Markets, Inc.*, 303 N.L.R.B. 256, 258 (1991), rev'd on other grounds, 961 F.2d 700 (8th Cir. 1992), while the General Counsel must carry that burden when he alleges an individual's supervisory status as part of his case, see, *e.g.*, *Serv-U-Stores, Inc.*, 225 N.L.R.B. 37, 46-47, 50, 58 (1976). The Board applies that rule to the full spectrum of industries subject to the Board's jurisdiction. See, *e.g.*, *Commercial Movers, Inc.*, 240 N.L.R.B. 288, 290 (1979); *Thayer Dairy Co.*, 233 N.L.R.B. 1383, 1387 (1977) (collecting cases).

The Board's rule effectuates Congress's intention that the exclusion of supervisors from the coverage of the Act would be a limited one. The original Wagner Act did not distinguish supervisory from non-supervisory personnel; accordingly, the Board permitted supervisory employees, such as foremen, to join labor organizations, and required employers to

[13] The allocation of the burden of proof is not determinative in this case, as the Board found that "the preponderance of the evidence establishes that the nurses are employees." App., *infra*, 13a n.1. Nevertheless, review of this issue is warranted because it has divided the circuits and because the Sixth Circuit has indicated that its position will govern future cases reviewed in that circuit.

bargain with their collective bargaining representatives. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). By amending the Wagner Act in 1947 to exclude supervisors,[14] Congress placed outside the protection of the Act a category of employees formerly covered by it. In doing so, the Senate Labor Committee observed that, "[i]n framing th[e] definition [of "supervisor"] the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory." S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947). The supervisor exclusion was intended to apply only to "the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." *Id.* at 4. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974). Because the determination that an individual is a supervisor means that that person loses his organizational and other rights under the Act, the Board places upon the party seeking to invoke that exclusion the burden of proving that the exclusion applies.

Other courts of appeals have approved the Board's method of allocating the burden of proof of supervisory status, both in health care and non-health care contexts. See *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991); *Schnuck Markets, Inc.* v. *NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); cf. *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) (noting that the "burden of persuasion" is on the employer respecting proof of the ratio that would exist between supervisory and

[14] See Labor-Management Relations Act, ch. 120, Tit. I, § 101, 61 Stat. 137-138.

non-supervisory personnel if the nurses in that case were supervisors). See also *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983) (upholding Board allocations of burdens of proof in another context). By invariably placing the burden of proving supervisory status on the Board, the decision of the Sixth Circuit conflicts with these decisions and, accordingly, warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 92-5291/5469

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA, PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT/CROSS-PETITIONER

ON PETITION FOR REVIEW AND ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided and Filed March 10, 1993

Before: JONES, and SILER, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

ANTHONY J. CELEBREZZE, Senior Circuit Judge. Petitioner and Cross-Respondent, Health Care & Retirement Corporation of America, hereinafter referred to as either "petitioner" or "HCR", timely filed a petition to review the Order of the

National Labor Relations Board, ("the Board"), dated March 3, 1992. Respondent and Cross-Petitioner, the National Labor Relations Board, hereinafter referred to as either "General Counsel" or "respondent", filed a cross-petition for enforcement of the Board's Order.

I.

Petitioner operates a nursing home facility in Urbana, Ohio. In April, 1989, one of the facility's employees, Ruby Wells, filed a charge with the NLRB claiming three HCR employees, including herself, had been discharged for participating in activities protected by the National Labor Relations Act. The charge also alleged that she and two other employees received warnings from the nursing home for their participation in protected activities. On May 25, 1989, the Board issued a complaint alleging respondent had committed an unfair labor practice as defined by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("the Act"). Specifically, the complaint accused HCR of disciplining certain employees who were licensed practical nurses (LPNs) and that the employees were being disciplined for engaging in concerted protected conduct for the purpose of collective bargaining and other mutual aid and protection in violation of Section 8(a)(1) of the Act.

A hearing was held before an Administrative Law Judge ("ALJ") during which both sides presented evidence. HCR contended that the nurses were not protected by the Act because they were supervisors. The General Counsel conceded that if the nurses were found to be supervisors, then they were not to be given protected status. Moreover, HCR maintained that it acted against the nurses for entirely appropriate, lawful, reasons.

The ALJ initially found the nurses to be "employees" within the meaning of the Act and, therefore, cloaked with the protections provided for by the Act. Nevertheless, the ALJ held that HCR had not committed an unfair labor practice by discharging employees for engaging in allegedly protected activities. Rather, the ALJ found the discharges were based on justifiable considerations. Furthermore, the ALJ determined that HCR had not, except in one instance, improperly issued written warnings.

The General Counsel filed exceptions to the decision of the ALJ disputing the lack of a finding of unfair labor practices. HCR filed cross-exceptions challenging the ALJ's determination that the nurses were employees and not supervisors within the meaning of § 2(11) of the Act. On January 21, 1992, the Board issued its Decision and Order. Regrettably, the Board's Order barely addressed HCR's cross-exceptions, upholding the ALJ's determination the nurses were employees and not supervisors, merely referring to it in a footnote. The Board, upon review, however, concluded that the ALJ had incorrectly determined that HCR did not commit an unfair labor practice. Instead the [B]oard found that HCR had, in fact, discriminated against the employees for engaging in concerted protected activity in violation of § 8(a)(1) of the Act. The Board ordered HCR to cease and desist from engaging in unfair labor practices and to reinstate the nurses with back pay.

We now have before us HCR's petition to review the Board's decision. The Board has also filed a cross-petition to enforce the Board's order.

II.

HCR's nursing home in Urbana, Ohio, known as Heartland of Urbana, contains 100 beds and provides skilled long-term care for its residents. Heartland employs approximately 100 people. The Nursing Department is staffed by a Director of Nursing ("DON") and an Assistant Director of Nursing ("ADON"), thirteen to fifteen registered nurses and LPNs (known as staff nurses), and fifty to fifty-five aides. The nursing home is physically divided into two fifty-unit wings. During the day, each wing is staffed with one nurse and six aides. During the evening shift, there are one nurse and four aides per wing, and at night there is one nurse per wing and four or five aides on duty for the entire facility. The aides report directly to the staff nurse on duty. There is also a treatment nurse and a patient assessment nurse, whose duties, along with the DON and the ADON, are performed during normal business hours.

During late 1988, and continuing into 1989, the atmosphere at Heartland deteriorated. There was animosity among the employees and morale was low. This manifested itself in a series of disputes between management and employees. Three of the LPNs requested a meeting with Brenda Stabile, the nursing home Administrator, to discuss their plight. Ms. Stabile refused to meet with them at that time, asserting that she was too busy. She did, however, instruct them to make an appointment for later in the week. Rejecting this approach, the nurses drove to Toledo, Ohio with a mission of meeting with Jim Millspaugh, HCR's Director of Human Resources, and Bob Possanza, HCR's Vice-President of Operations. The two men met with the nurses and during

the discourse, Millspaugh agreed to investigate their complaints.

Millspaugh did indeed conduct an investigation, the results of which led to the hiring of more aides, increasing the wages aides were paid, the disciplining of four nurses and ultimately terminating three nurses.[1] HCR maintains the nurses who were disciplined, were disciplined because of their uncooperative attitude and not because of their participation in allegedly protected acivities.

III.

Petitioner contends on appeal that both the ALJ and the Board erred by not finding the staff nurses to be supervisors, as defined by the Act, hence outside the scope of the Act's protection. On appeal, both parties acknowledged, as they did in the proceedings below, that should the staff nurses' positions be determined to be "supervisory" within the meaning of the Act, then the nurses are not protected by the provisions of the Act.

The ALJ properly recognized that the issue of whether the nurses were supervisors or employees must first be resolved before the merits of the unfair labor practice charges could be addressed. He addressed the matter extensively, concluding as follows:

> It is clear that in common parlance Heartland's nurses are "supervisors." They give orders (of certain kinds) to the aides, and they follow those orders. In a manner of speaking,

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[1] One of the nurses who was disciplined had not gone on the trip to Toledo. Her employment was not, however, terminated. Only one of the nurses who traveled to Toledo was not disciplined in any way.

certainly, the nurse on duty is in charge of a wing of the facility.

But Section 2(11)'s definition of supervisor is different from Webster's. And as I understand the meaning of that provision, Heartland's nurses were not supervisors during the period under consideration.

Decision of the ALJ, p. 10.

The Board, in reviewing the ALJ's decision, barely addressed this controversy. In a footnote, the Board stated its agreement with the ALJ's finding that the staff nurses were employees within the meaning of the Act. The Board further stated that the burden to prove supervisory status rested with HCR, though it acknowledged that this court has stated that it is the Board and not the employer who must prove employee status. *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (1987). Yet, in spite of this acknowledgement, the Board opined that it, "has not acquiesced on this point." Finally, the Board summarily stated that, in any event, the preponderance of the evidence established the nurses were employees as defined by the Act.

In the case at bar, this court's analysis must be guided by the need for a distinction between supervisor and employee. The exclusion of supervisors from coverage under the Act was considered essential to allow employers to have the undistracted allegiance of employees in key positions. *See Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790, 806 (1974). By not providing coverage to supervisors, Congress maintained a reasonable balance of power between employers and unions which could potentially arise if supervisors were themselves union members. *Children's Habilitation Center, Inc. v. N.L.R.B.*, 887 F.2d 130, 131 (7th Cir. 1989).

A panel of this court has recently addressed the issue of whether nurses were supervisors or employees for collective bargaining purposes, holding as follows:

> In language that has been unchanged since it was added to the Taft-Hartley Act in 1947, § 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), defines the term "supervisor" thus:
>
> > "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connecion with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It bears emphasis, perhaps, that "any" individual who meets the statutory tests is a supervisor; there is no exception for supervisors in the health care field. In 1974 the Senate Labor Committee considered recommending enactment of legislation to create such an exception, but the idea was dropped. See S. Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974), reprinted in (1974) U.S.Code Cong. & Admin. News 3946, 3951.

> It also bears emphasis that § 2(11) uses the disjunctive "or" in listing the numerous indicia of supervisory status. *NLRB v. Medina County Publication, Inc.*, 735 F.2d 199, 200 (6th Cir. 1984). Any individual who has authority in any *one* of the listed categories is a supervisor, according to the statute, as long as such authority is to be exercised "in the interest of the employer" and as long as its exercise "is not merely of a routine or clerical nature, but requires the use of independent judgment."

Beverly California Corp. v. NLRB, 970 F.2d 1548 (6th Cir. 1992).

It must be noted that there is a history of conflict between the Board and the courts concerning the supervisory status of nurses employed at nursing homes. *Children's Habilitation Center, Inc.*, 887 F.2d at 134. The Board has always taken the position that a nurse is not a supervisor when her conduct is in the furtherance of the patient's interest. The Board maintains that nurses are working for the patient's interests, not the interests of their employers. Therefore, the Board maintains that nurses should not be considered to be supervisors under the Act. This position, however, was rejected by this court in *N.L.R.B. v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987). In *Beacon Light*, this court held that if a nurse's actual functions performed met the statutory criteria for being a supervisor, then the nurse would not be disqualified because he/she was engaged in "mere patient care." The court in *Beacon Light* further held that the burden of proving employee status for bargaining unit determinations rested with the Board. *Id.* at 1080.

The Board, nevertheless, once more took this position before the Sixth Circuit in *Beverly*. Again, this court rejected a distinction based on whether a nurse's actions were taken in the interest of a patient. The Board, as cross petitioner, is now once again before this court asking not only to uphold its own order, but to overrule *Beacon Light* and its progeny of cases. As we have already noted, the Board is aware of the law in the Sixth Circuit, but has steadfastly failed to apply it in a fashion appropriate with case authority. It is unfortunate that this court must repeatedly remind the Board that it is the courts, and not the Board, who bear the final responsibility for interpreting the law. *Beverly California Corp.*, 970 F.2d at 1555.

Turning to the case *sub judice*, this court must first determine whether the nurses are indeed supervisors. The *Beacon Light* court established the standard of review to be applied in determining supervisory status as "whether there is substantial evidence that the LPNs do not serve in a supervisory capacity." *Beacon Light Christian Nursing Home*, 825 F.2d at 1078. As will be explained below, respondent has failed to establish, by substantial evidence, that the LPNs are not supervisors. Moreover, there is substantial evidence to support HCR's claim that the LPNs are, in fact, supervisors.

It appears that the staff nurses are indeed supervisors within the definition of § 2(11). Among a staff nurse's functions are the authority to assign the nurses aides and to responsibly direct them. The Director of Nursing assigns each aide to a certain shift. Once assigned to a shift, the staff nurse in charge is responsible for assigning each aide to a particular patient. Each aide assignment is based

primarily upon the needs of the patients [2], but also with an attempt to rotate the aides' assignments. When aides do not report to work or leave work early, it is the staff nurse's responsibility to attempt to find a replacement. A staff nurse has the authority to offer other aides the option of working overtime to fill such vacancies. Although it is the staff nurse's responsibility to find a replacement, the staff nurse has the discretion to determine how he/she will accomplish his/her duties. A staff nurse may also assign and/or approve breaks and lunches.

It is clear that the duties of a staff nurse at Heartland nursing home clearly require both assigning aides to specific tasks and directing the operation of the aides, as well as the entire nursing home, when the Director of Nursing or his/her assistant is not present. As this court made clear in *Beverly*, § 2 (11) provides that an employee is considered a supervisor if *any one* of the enumerated job tasks are undertaken, provided the authority is exercised in the interest of the employer and requires the use of independent judgment. *Beverly Calif. Corp.*, 970 F.2d at 1548. The job duties of the LPN's at Heartland require the use of independent judgment and are taken in the interests of the employer. Accordingly, in the case *sub judice*, the LPN's must be considered supervisors within the meaning of the Act and, thus, outside the coverage of the National Labor Relations Act. Moreover, respondent failed to meet its burden of providing substantial evidence of non-supervisory status. Neither the ALJ's decision nor the Board's Order recognized that the burden

[2] Certain patients may require more aides based on the patients' physical and mental infirmities.

rested not on HCR, but on respondent. A burden which was not met.

As this court stated in *Beverly*, it is up to Congress to carve out an exception for the health care field, including nurses, should Congress not wish for such nurses to be considered supervisors. It is the responsibility of this Court to interpret the law as written by Congress and promulgated through case decisions. Although the Board has maintained it will not yield this point, when the facts so warrant, as in the case at bar, this court must reverse the decision of the Board. Since the staff nurses are supervisors and not covered under the Act, this court need not review the merits of the unfair labor practice claims.

IV.

The petition for review is GRANTED, the Board's Order of January 21, 1992 is VACATED, and the cross-application for enforcement is DENIED.

APPENDIX B

HEALTH CARE & RETIREMENT CORP. OF AMERICA
AND RUBY A. WELLS

Case 9-CA-26348

January 21, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT,
AND RAUDABAUGH

On October 22, 1990, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions with a supporting brief and an answering brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Background

The facts, as more fully set forth by the judge, may be summarized as follows. The Respondent operates a nursing home in Urbana, Ohio, where it employed the alleged discriminatees, Julia Goldsberry,

Cynthia Cordrey, and Ruby Wells, as licensed practical nurses (LPNs).[1]

During the latter part of 1988 and early January 1989, there were perceived to be problems at the facility, many of which became topics of conversation among the employees. These included what some employees thought were the Respondent's disparate enforcement of its absentee policy, short staffing, low wages for nurses aides, the Respondent's unreasonably switching its prescription business from one pharmacy to another, which increased the nurses' paper-

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[1] The judge found, and we agree, that the Respondent's staff nurses are employees within the meaning of the Act. In his analysis, the judge relied on *Ohio Masonic Home*, 295 NLRB No. 44, slip op. at 10 fn. 7 (June 15, 1989), for the proposition that the General Counsel has the burden of proving that the nurses are employees, and not supervisors. We disagree. The party alleging supervisory status, in this case, the Respondent, bears the burden of proving an individual is a supervisor. *St. Alphonsus Hopital*, 261 NLRB 620, 624 (1982). See also *Commercial Movers*, 240 NLRB 288 (1979). We find that the Respondent failed to meet this burden.

We disagree with the Respondent's argument that the Sixth Circuit's ruling in *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (1987), requires a different result. In that case, the court held that "[t]he Board always has the burden of coming forward with evidence showing that employees are not supervisors in bargaining unit determinations." *Beacon Light*, at 1080. The Board has not acquiesced on this point. See *Ohio Masonic Home*, supra. In any event, we found that the preponderance of the evidence establishes that the nurses are employees.

Member Oviatt agrees with his colleagues that under the facts of this case the nurses are employees. But see his dissent in *Riverchase Health Care Center*, 304 NLRB No. 111 (Aug. 27, 1991).

work, and management's failure to communicate with employees.

On January 10, 1989, nurses Goldsberry, Cordrey, and Wells asked to meet with Brenda Stabile, the Respondent's administrator, to discuss these problems. Stabile stated that she was too busy to meet with them and that they should make an appointment for later in the week. The nurses discussed what action they should take and decided to speak with an official at the Respondent's headquarters in Toledo.

The next day the nurses drove to Toledo and met for an hour with Jim Millspaugh, the Respondent's director of human resources, and Bob Possanza, the Respondent's vice president for operations. They voiced the complaints and concerns of the nursing staff. Millspaugh agreed to investigate and to report back to them. Possanza assured the nurses that they would not be harassed for bringing their concerns to headquarters' attention.

Millspaugh notified both the Respondent's regional manager, Dee Nevergall, and Stabile of the visit and about the matters raised by the nurses. Millspaugh then launched his own investigation which culminated in the Respondent's hiring more aides, increasing the wages for the aides, and disciplining and subsequently terminating Goldsberry, Cordrey, and Wells.[2]

The judge found that the General Counsel failed to prove that the nurses were unlawfully terminated or, except for one instance, disciplined for engaging in protected concerted activity. He credited Mill-

[2] Another nurse, Connie Thatcher, who did not participate in the Toledo meeting, was also disciplined.

spaugh's testimony that on March 2, at his final meeting with employees at the facility, the three nurses conveyed an attitude of "resistance to change . . . to . . . make Heartland of Urbana a good facility." According to Millspaugh, this "attitude" or "demeanor" was reflected in the three nurses crossing their arms and rolling eyes in response to comments made by Millspaugh. The judge concluded, however, that the nurses' nonverbal body movement was not protected by the Act because there was "no indication that the nurses intended that their body postures and facial expressions be seen by Millspaugh as communication." The judge found further that there were too many "links in the causal chain" to conclude that the nurses were terminated for having complained to higher management in Toledo. The General Counsel excepts. For the reasons set forth below, we agree with the General Counsel.

The Discharges

Millspaugh visited the Urbana facility on three different occasions in response to the three nurses' concerns. On January 16, 1989, he met with the department heads. At this meeting he asked each person to name anyone associated with the tension and unrest in the facility. He explained that he had recently become aware of this situation through his talks with Stabile and Regional Manager Nevergall. Cordrey's and Wells' names appeared on every slip and Goldberry's name apeared on many. A few other employees were named, but not as often as any of those three.

Two days later, Millspaugh met with the employees in each dpartment. He listened to their complaints and concerns. Millspaugh determined that

the concerns raised by the three nurses were shared by many others, and that some of their complaints were valid. Millspaugh cautioned, however, that the employees were supposed to support decisions made by management, and he felt that all the nurses agreed with him on this point.

On March 2, Millspaugh traveled to the Urbana facility for the final time to meet with all the nurses to inform them of the results of his investigation. He met privately with Goldsberry, Cordrey, and Wells before the general meeting to tell them of his decisions. During the meeting with all the nurses, Millspaugh testified that there was some "heated conversation" among the nurses about the appropriateness of the policies at the facility and about how things should be done. Millspaugh testified that he observed "resistive behavior" on the part of Goldsberry, Cordrey, and Wells to his comments. In particular, he observed that they rolled their eyes and sat with their arms crossed. According to Millspaugh, the three nurses thereby demonstrated that they were unwilling to change their mode of operation, attitude, or cooperation for the good of the facility. Based on his observations and perceptions of the three nurses at the meeting, Millspaugh made the decision to terminate them. He consulted with Regional Manager Nevergall and two others who agreed with him that the discharges were appropriate. On March 14, Stabile told Cordrey and Wells that they either had to resign or they would be fired. Both refused to resign and they were fired. On March 16, Goldsberry was given the same option. Goldsberry resigned. All three were told that the Respondent's resign-or-be-fired ultimatum was because of their "attitude" and their opinion of management.

Conclusions on Discharges

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),[3] the Board set forth its causation test for cases alleging violations of the Act that turn on employer motivation. The General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. The burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. In rebutting the General Counsel's case, the employer cannot simply present a legitimate reason for its action, but must also persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). Applying these principles to the facts of this case, we find that the discharges of Goldsberry, Cordrey, and Wells violated the Act.

We find that Goldsberry, Cordrey, and Wells engaged in protected activity by traveling to Toledo to speak with members of management about workplace matters of concern to the employees and that they continued to engage in protected conduct up to and including the meeting on March 2.[4] An infer-

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[3] *Wright Line* was approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] We reject the Respondent's argument that the discriminatees' activities lost the protection of the Act because their "carping" was not directed towards improving the lot of employees. First, we find that one trip to management headquarters to discuss legitimate employee concerns does not

ence that their protected conduct was a motivating factor in Millspaugh's decision to discharge them is plain from his testimony. The judge credited Millspaugh's testimony that he made the decision to terminate Goldsberry, Cordrey, and Wells after observing their "attitude" and/or "demeanor" at the March 2 meeting. Their "demeanor" indicated to Millspaugh that they were resistant to change and to getting "on board" to make the Respondent a good facility. Millspaugh's meeting with the nurses on March 2 to announce the results of his investigation, at which he observed the three discriminatees' demeanor, would not have occurred had the discriminatees not traveled to Toledo to discuss their concerns with management.[5] Further, their "body language" reaction to Millspaugh's statements at the March 2 meeting plainly evidenced their dissatisfaction with the extent to which Millspaugh was willing to remedy their perceived inadequacies in working conditions. Although Millspaugh did not testify that the nurses' demeanor was the sole reason for their discharges,[6]

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establish a pattern of constant criticisms and attacks on management as alleged by the Respondent. Second, we fail to see how discussing employee wages, enforcement of absentee policies, short staffing, and poor communication between management and employees could be construed as anything other than an attempt to improve employee working conditions.

[5] See *Bronco Wine Co.*, 256 NLRB 53 (1981).

[6] Millspaugh testified that as a result of his investigation, he determined that Goldsberry, Cordrey, and Wells were the employees mainly responsible for the tension and unrest at the facility. He also testified that he was told that each of the three nurses spoke with residents and family members about problems at the facility. The Respondent, however, offered no evidence in support of these allegations. It is undisputed that no member of management ever contacted any resident or family member nor were any of the disincriminatees asked to confirm or deny these allegations. We find no evidence in the record to support them.

the Respondent does not dispute the judge's findings that their demeanor at the March 2 meeting, which we have found to be protected concerted activity, was a factor in the decision to discharge them. Accordingly, we find that the General Counsel has presented a prima facie case to support the allegation that the nurses' discharges violated Section 8(a)(1).

We further find that the Respondent has failed to demonstrate that it would have taken the same action against Goldsberry, Cordrey, and Wells in the absence of their protected activity. Although Millspaugh testified that he took into consideration other factors, he was emphatic that the main reason for the nurses' discharge was their resistance to policy changes.[7] The record, however, is barren of any testimony or evidence indicating any instance where any of the three discriminatees defied an order or failed to cooperate with a management decision. What remains is a decision to discharge employees because of their protected activity, without any evidence that the Respondent would have taken the same action in the absence of the protected activity.[8]

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[7] The Respondent offered no evidence to show that any other employee had ever been discharged for "resistance" to policy changes.

[8] Millspaugh's references to the employees' "demeanor" and "resistance to change" indicate that he believed that Goldsberry, Cordrey, and Wells would continue to engage in the same type of activity as they had been. These activities including discussing and bringing to the attention of management workplace matters of legitimate concern to the em-

The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves.[9] The Board and courts have found, nonetheless, that an employee's

ployees. These activities are protected under the Act. We find, therefore, that Millspaugh's stated reasons for discharging the discriminatees support finding a violation of Sec. 8(a) (1).

Similarly, the judge suggests that the Respondent, in deciding to discharge the three nurses, could lawfully rely on Cordrey's statements to Millspaugh on March 2 both before and after the main meeting because they were not protected by the Act. As noted, Millspaugh met privately with the three nurses to inform them of his decisions. Those decisions were not, in the view of the nurses, sufficiently responsive to the problems at the nursing home. In the premeeting, Cordrey responded to Millspaugh's statement that he felt Stabile now knew that she had to cooperate with the nurses to make the facility run effectively. Cordrey told Millspaugh that his efforts "hadn't helped." In response to Millspaugh's request for her to become "part of the solution," Cordrey commented to Millspaugh after she left the meeting that she (Cordrey) was "not part of the problem." Contrary to the judge, we find that Cordrey's remarks were protected and demonstrated that Cordrey intended to continue to work for changes at the nursing home. Further, Cordrey's remarks offer no basis for discharging Wells and Goldsberry—unless the Respondent's intention was to end all protected activity.

[9] In *Consumers Power Co.*, 282 NLRB 130, 132 (1986), the Board stated:

> . . . when an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.

See also *Hawaiian Hauling Service*, 219 NLRB 765 (1975).

flagrant, opprobrious conduct, even though occurring during the course of Section 7 activity, may sometimes lose the protection of the Act and justify disciplinary action on the part of an employer.[10] Not every impropriety, however, places the employee beyond the protection of the Act. For example, the Board and the courts have found foul language or epithets directed to a member of management insufficient to require forfeiting employee protection under Section 7.[11]

We find that the conduct engaged in by Goldsberry, Cordrey, and Wells (i.e., their "demeanor"), and for which they were allegedly discharged, was mild if not innocuous.[12] Thus, the employees' protected activities did not lose the protection of the Act. Under these circumstances, we find that Julia Goldsberry, Cynthia Cordrey, and Ruby Wells were discharged in violation of Section 8(a) (1) of the Act.

The Disciplinary Warnings

On February 27, 1989, Cordery received three written warnings and Wells received four. Nurse

[10] See, for example, *Chrysler Corp.*, 249 NLRB 1102 (1980).

[11] See *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), enfd. 430 F.2d 724 (5th Cir. 1970); *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Postal Service*, 241 NLRB 389 (1979); *Burle Industries*, 300 NLRB No. 50, JD slip op. at 11-14 (Oct. 15, 1990); *Marion Steel Co.*, 278 NLRB 897 (1986). See also *Severance Tool Industries*, 301 NLRB No. 147 (Feb. 28, 1991).

[12] Surely the employees' "body language" included none of the vulgarity or rudeness like that permitted in the cases cited above.

Connie Thatcher received two written warnings on February 23 and another four on March 10.

A. *Warnings About Improper Documentation*

Nurses Cordrey and Thatcher received a notice of "verbal warning" for mistakes made in their January 1989 treatment records and Wells received a more serious "written warning" for the same offense. All the warnings were dated February 15.

The Respondent previously had employed a patient-assessment nurse who had corrected errors in the nurses' treatment records. None was employed, however, during the latter part of 1988. On February 1, 1989, the Respondent was notified by the State of Ohio that its records for the months of November, December, and January were to be audited the next day. Members of management attempted to review the records and make the necessary corrections. They corrected the A wing records but did not have time to correct the B wing records. They found numerous errors committed by many nurses in the A wing, but only nurses Cordrey, Thatcher, and Wells were disciplined.

B. *Discipline of Cordrey and Wells for Missing an "Inservice"*

Periodically, the Respondent conducts training services for its nurses called "inservices." For some inservices, attendance is mandatory. On February 16, the Respondent conducted a mandatory inservice on documentation. Although many nurses missed the meeting, only Cordrey and Wells received written disciplinary notices for doing so.

C. *Discipline of Thatcher Regarding Assignment of Aides*

On March 9, the Respondent's director of nursing instituted a new system for the assignment of aides. Thatcher had some difficulty that night in following the new instructions, leading to some problems among her aides the next day. On March 10, Thatcher was disciplined for not following instructions.

D. *Discipline of Cordrey, Wells, and Thatcher for Excessive Absences and Wells' Discipline for an "Unexcused Absence"*

The Respondent maintained a policy that two absences in 1 month or six absences in 1 year are excessive and will result in progressive discipline. The policy had been routinely ignored, but sometime in late 1988 or early 1989, the policy was reimposed.

To arrive at the number of absences necessary to discipline Cordrey, management included an absence for funeral leave, a specified employee benefit. Wells was issued two warnings, both of which included the same absence. Wells had volunteered to work on Friday, February 3, which was not her regular workday, provided Administrator Stabile informed her in advance who her replacement was. Stabile did not do so, nor did the February schedule contain Wells' name for that Friday. Wells left Stabile a note that morning confirming that she assumed she was not to work because she had not heard back from Stabile and her name was not on the schedule. Stabile proceeded to brand Wells a "no call/no show" and disciplined her for an unexcused absence as well as for two occurrences in a month.

Conclusions on Discipline

The judge concluded that none of the disciplinary actions were taken as a result of the nurses' protected concerted activity in connection with their traveling to Toledo.[13] We disagree.

We find that the General Counsel made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to discipline Cordrey, Wells, and Thatcher. Each of the disciplinary actions occurred shortly after Goldsberry, Cordrey, and Wells went to Toledo and in the middle of Millspaugh's resultant investigation of their complaints and concerns.[14] Thus, after the employees engaged in protected concerted activity, the Respondent began a course of disciplinary action against them. Stabile testified that prior to February 27, neither Cordrey nor Wells had ever been written up, reprimanded, or otherwise disciplined.[15] In fact, on a loan form

[13] The judge found that the discipline of Cordrey and Wells for missing the February 16 "inservice" violated Sec. 8(a)(1). He did not find, however, that the discipline was in response to the nurses' protected concerted activities in conjunction with their trip to Toledo, but rather that it was based on management's belief that the nurses were protesting certain management policies. For the reasons set forth in our decision, we find the discipline violated Sec. 8(a)(1) but not for the reasons stated by the judge.

[14] Thatcher, admittedly, was not one of the "Toledo travellers." She was, however, a "good friend" of the three according to Stabile. Stabile also testified she associated Goldsberry, Cordrey, Wells, and Thatcher together as the leaders of the complaining group and that she considered all four nurses to be resistant to management policies.

[15] Cordrey had worked for the Respondent for almost 5 years and Wells had worked there for over 2½ years.

submitted by Wells to the Respondent dated December 15, 1988, the Respondent marked her probability of continued employment as "excellent."

The Respondent's motive is fully revealed by the disparate way in which the warnings were given out.[16] For example, the writeups for the documentation errors were dated February 13, but the nurses were not notified until the February 16 inservice that such errors would result in discipline. Further, Stabile admitted that, during the course of management's examination of the treatment records, she noticed that many nurses had made a high number of errors, but that only Cordrey, Wells, and Thatcher were disciplined. Stabile testified that the reason they were singled out was because they had attended a previous inservice on documentation. We find this argument unpersuasive in light of the fact that at least one other nurse had attended the earlier inservice, made errors in February, and was not disciplined. Also, the nurses had previously relied on a patient-assessment nurse to either point out their errors or to correct them, and no one had been previously reprimanded for treatment-records errors.

The Respondent offered no justification for issuing written disciplinary notices to Cordrey and Wells for missing the February 16 inservice. Other nurses did not attend, but they were not disciplined.[17] Further, the Respondent did not follow its own policy of giv-

[16] We note that Goldsberry was not disciplined. The Respondent, however, attempted to justify her discharge on the same grounds as Wells' and Cordrey's.

[17] One nurse scheduled for the inservice called in sick and another missed the inservice to take her son to the dentist, and neither was disciplined.

ing 2 weeks' notice for a mandatory inservice. Cordrey was not on duty at any time between the announcement and the inservice itself, and both Cordrey and Wells had advised management in advance of the inservice that they could not attend because both had sick children.[18]

Finally, we find it more than purely coincidental that the Respondent's absenteeism policy, which previously had been either loosely enforced or not enforced at all, was suddenly strictly enforced to the detriment of Thatcher, Wells, and Cordrey. This occurred shortly after Wells and Cordrey had traveled to Toledo and after many of the nurses, including Thatcher, had discussed problems at the facility among themselves. The Respondent went to great lengths to find that Cordrey and Wells violated its absenteeism policy, charging Cordrey with an absence for funeral leave, which employees are permitted to take as a benefit, and charging Wells with an absence on a day she was not scheduled to work. We find that the Respondent more strictly enforced its attendance policy against the discriminatees in response to their protected activities.[19]

We find that the Respondent has offered no credible explanation to justify its disciplinary action against Cordrey, Wells, or Thatcher. We therefore find that the Respondent did not meet its burden under *Wright Line* of establishing that it would have

[18] Cordrey learned about the inservice from another nurse before February 16.

[19] The issuance of warnings pursuant to a policy of stricter enforcement instituted in response to protected activity violates Sec. 8(a)(1). See *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987).

taken the same action regardless of the nurses' protected concerted activity. We therefore, find that each warning violated Section 8(a)(1).

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

We shall also order the Respondent to offer Julia Goldsberry, Cynthia Cordrey, and Ruby Wells immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed and to make them whole for any loss of earnings and other benefits suffered because of the discrimination against them, less any net interim earnings, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Health Care & Retirement Corp. of America, Urbana, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they have engaged in protected concerted activities.

(b) Issuing disciplinary notices and warnings to employees because they have engaged in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Julia Goldsberry, Cynthia Cordrey, and Ruby Wells immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the discharge of Cynthia Cordrey and Ruby Wells and the resignation of Julia Goldsberry and notify them in writing that this has been done and that evidence of the discharges or resignation will not be used as a basis for any future personnel actions against them.

(c) Remove from its files any reference to the unlawful disciplinary actions taken against Cynthia Cordrey, Ruby Wells, and Connie Thatcher and notify them in writing that that this has been done [and] that evidence of the disciplinary actions will not be used as a basis for any future personnel actions against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying,

all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, joint, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT issue disciplinary notices and warnings to any of you because you have engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercises [sic] of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Julia Goldsberry, Cynthia Cordrey, and Ruby Wells immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole

for any loss of earnings and other benefits resulting from the discharges or resignation, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to the discharges or resignation and that the discharges and/or resignation will not be used against them in any way.

WE WILL remove from the files of Cynthia Cordrey, Ruby Wells, and Connie Thatcher any reference to the disciplinary notices and warnings issued to them and WE WILL notify them in writing that this has been done and that the disciplinary actions will not be used against them in any way.

HEALTH CARE & RETIREMENT CORP.
OF AMERICA

APPENDIX C

JD-247-90
Urbana, Ohio

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 9-CA-26348

HEALTH AND RETIREMENT CORPORATION OF AMERICA

and

RUBY WELLS, AN INDIVIDUAL

Engrid Emerson Vaughn, Esq., for the General Counsel

R. Jeffrey Bixler, Esq. (*Cooper, Straub, Walinski & Cramer*), of Toledo, Ohio, for the Respondent [1]

DECISION

Stephen J. Gross, Administrative Law Judge. The Respondent, Health Care and Retirement Corporation of America (HCR), owns and operates about 140 fa-

[1] The Charging Party was represented at the hearing by Pattrick Dunphy, Esq., of Dayton, Ohio. But he later requested permission to withdraw as counsel, and I granted the request.

cilities in 27 states.[2] All but two are nursing homes. The only HCR facility we are concerned with here is a nursing home in Urbana, Ohio. HCR calls it Heartland of Urbana." (I will henceforth refer to Heartland of Urbana simply as "Heartland." [3]) Heartland's employees are not represented by a union.

The General Counsel alleges that HCR disciplined several Heartland nurses, and fired three of them, because the nurses engaged in protected activities, thereby violating Section 8(a)(1) of the National Labor Relations Act (the Act). HCR claims that it acted against the nurses for entirely appropriate, lawful, reasons. HCR also claims that Heartland's nurses are "supervisors" within the meaning of the Act, not "employees." And as the General Counsel agrees, if the nurses are supervisors, then HCR did not violate the Act even if its motivations were as alleged by the General Counsel.

I. *Are Heartland's Nurses Supervisors Or Employees*

Section 2(11) of the Act defines "supervisor" as—

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in con-

[2] HCR admits that it is an employer engaged in commerce.

[3] HCR calls many of its facilities "Heartland," as in Heartland of Lansing, Heartland of Beaver Creek, and so on. But none of HCR's other "Heartlands" are pertinent to the discussion here.

nection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The period at issue here is January through mid-March of 1989. If, during that period, HCR bestowed on the alleged discriminatees any of the authority to which Section 2(11) refers, they were supervisors, not employees. *E.g., Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949); *Phelps Community Medical Center*, 295 NLRB No. 55 (June 15, 1989).

This part of the decision considers whether HCR did bestow any such authority on those Heartland nurses during such period.[4] Because Section 2(11) is to be read "in the disjunctive" (*id.*), as I consider each facet of the nurses' authority I will state my conclusion about whether it constitutes the kind of authority encompassed by Section 2(11).

The Organization Of Heartland's Nursing Department

Anyone who has read virtually any of the dozens of Board cases on the status of nurses at nursing homes will be generally familiar with the organization of Heartland. It is a 100-bed facility divided into two wings, A and B. Heartland is headed by an administrator and, under the administrator, a number of department heads, including the director of

[4] For simplicity's sake I use the present tense in discussing the nurses' authority and responsibilities. But the record suggests that the authority and responsibilities of Heartland's nurses may have changed subsequent to the period of concern to us here.

nursing (the D.O.N.), who heads Heartland's nursing department. The D.O.N. is seconded by an assistant D.O.N. (the A.D.O.N.). (All parties agree that the D.O.N. and the A.D.O.N. are supervisors within the meaning of the Act.)

There are around 65 personnel in the nursing department under the D.O.N. and A.D.O.N., as follows:

—a "patient assessment nurse" and a "treatment nurse"

—9 to 11 staff nurses (mostly licensed practical nurses (LPNs), with a few registered nurses (RNs))[5]

—50 to 55 nurse aides

One staff nurse is always on duty in each wing. (The treatment nurse does not figure in the events at issue here, and the patient assessment nurse does so only tangentially. I accordingly will refer to the staff nurses simply as "nurses.") Generally at least two aides are on duty in each wing, and sometimes as many as six are. (That variation in the number of on-duty aides will be discussed in more detail below.)

The Duties Of The Nurses, Generally

In the main Heartland's business is the long-term care of the infirm elderly. None of Heartland's residents can wholly take care of themselves. Some are unable to move by themselves, or dress themselves, or

[5] As it happens, the nurses who were the subject of the actions by HCR that the General Counsel alleges violated the Act were all LPNs. But the evidence shows that the duties of the staff nurses were virtually the same whether the nurses were LPNs or RNs.

bathe themselves, or feed themselves, or control their excretory functions. Some are even unable to change their position in bed by themselves. Some of the residents must be restrained to prevent them from injuring themselves. Sudden medical problems are not uncommon. Nor is death. Many of the residents need medication. Sometimes that medication is part of a day in, day out regimen. In other cases the medicine is needed to deal with a non-routine problem—often relatively benign (a headache, for instance), sometimes not (as in a sudden increase in blood pressure).

Heartland's aides are the ones with whom the residents have the most direct contact. It is the aides who bathe and dress the residents, comb their hair, push their wheelchairs, feed them, deal with their bed pans, and the like.

But by and large it is the responsibility of Heartland's nurses to ensure that the needs of the residents are met. As a practical matter that means that the nurses check for changes in the health of the residents, administer medicine, call physicians when that's warranted, oversee the work of the aides, maintain detailed records on treatment accorded the residents, receive status reports from the nurses they relieve and give status reports to aides coming on duty and to the nurses' reliefs, and handle incoming telephone calls from physicians and from relatives of residents who want information about a resident's condition. It can also mean bathing, feeding or dressing residents when an insufficient number of aides show up for work. Very little of the nurses' time is spent on matters that even suggest supervisory status.

Certainly the nature of the nurses' work points generally in the direction of employee status. On the

other hand, the nurses do have authority over the aides and have responsibilties regarding the aides (as will be discussed). And the fact that the nurses spend only a small fraction of their time exercising that authority and those responsibilities by no means excludes the possibility that the nurses are supervisors. *E.g., Northwoods Manor, Inc.*, 260 NLRB 854 (1982).

The Nurses' Role In Assigning Work to Aides

A description of the role of nurses in assigning work to aides is complicated by shift-to-shift variations in the aides' work, shift-to-shift variations in the number of aides on duty, and by the fact that during the relevant period the aides worked 8-hour shifts while the staff nurses worked 12-hour shifts.

Nurses work from either 7:00 a.m. to 7:00 p.m., or from 7:00 p.m. to 7:00 a.m. And as touched on earlier, there are always two staff nurses on duty, one at the nurse's station on each wing. The aides, on the other hand, work as follows:

7:00 a.m.- 3:00 p.m.—6 aides per wing
3:00 p.m.-11:00 p.m.—4 aides per wing
11:00 p.m.- 7:00 a.m.—2 aides per wing, with one "float"

Shifting aides from wing to wing. If an aide doesn't show up for work, the nurse on the understaffed wing (the A wing, say) may discuss with situation with the nurse on duty in the other wing (the B wing, in this example). That, in turn, may result in the two nurses agreeing that one of the B wing aides should switch during that shift to the A wing. The B wing nurse has the authority in that circumstance to order one of the aides to go over

to the A wing. But as a practical matter the nurse lets the aides decide among themselves who will work on the other wing.

(Another possible response is for the nurse on the affected wing to try to find a replacement for the missing aide. That will be discussed below.)

The role of the night-shift nurses in assigning duties to aides. Two of the nurses against whom HCR allegedly discriminated, Cynthia Cordrey and Ruby Wells, always (or almost always) worked the night shift, from 7:00 p.m. to 7:00 a.m. When nurses on that shift come on duty the four aides already there have previously been given their assignments. The night nurse doesn't change those assignments. Then, at 11:00 p.m., those four aides (per wing) leave, and two aides come on duty. But the two aides work togther to cover the whole wing. And aides on that shift rarely have any off-wing duties to handle. So apart from having occasionally to switch an aide from one wing to another (as just discussed), the night-shift nurses have no role in assigning work to aides.

The job assignment role of the day-shift nurses. It is up to the day-shift nurses to tell each aide which residents the aide is to care for. Some residents require much more care from aides than others. Moreover the amount of care each of the residents requires varies from day to day depending on things like whether the resident is scheduled for a shower. And in making up the assignments the nurse has to factor in the aides' off-wing duties. (Some aides, for example, assist in the dining room during the residents' meals.) But the job of assigning work to the aides does not demand great skill and finesse of the nurses. Every aide is able to do the work of every other aide.

And the nature of the aides' work is not highly technical. Also, it is Heartland's office, not the nurses, that specifies the off-wing work of the aides. In addition, throughout most of the period of interest to us, the nurses followed old patterns when setting up the aide-resident assignments (so that little thought went into the process). Lastly, the nurses routinely let the aides decide among themselves which aide was to cover which residents.

On the other hand, the way the nurses divide up the work among the aides (on the daytime or evening shifts) can have a considerable impact on how hard each of the aides has to work. Also, on about March 9 (which was subsequent to all of the events that led HCR to decide to fire nurses Cordrey, Goldsberry and Wells) the D.O.N. ordered a somewhat changed procedure for assigning work to the aides. At least one of Heartland's day-shift nurses, Connie Thatcher, seemed to have a lot of trouble working out appropriate assignments for the aides under the new procedure.

Using Section 2(11)'s standards of "routine," on the one hand, and "independent judgment," on the other, I conclude that the job assignment task of Heartland's nurses does not show the nurses to be supervisors. Heartland's night-shift nurses, of course, hardly have any assignment functions at all. As for the day-shift nurses, they have the authority to vary the aides' assignments in ways that can make a difference to the aides, and they are expected to exercise judgment in exercising that authority. But just about any task demands the exercise of some judgment. The question, therefore, is the nature of that judgment. And given the nature of the aides' work

and the fact that each aide has the skills to do the work of any other aide, the aide assignment duties of the nurses seem to me to fall well short of "requir[ing] the use of independent judgment," as that expression is used in Section 2(11). See, in this regard, *NLRB v. Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983); *Ohio Masonic Home*, 295 NLRB No. 44 (June 15, 1989).

Directing The Work Of The Aides

Once the aides have their assignments, there is little for the nurses to do in the way of "directing" them. It is clear that the nurses have the authority to criticize an aide for improperly performing a task, to tell an aide to redo a task inadequately done, and to direct an aide to do any minor chore that isn't covered by the assignment sheet. Nurses also issue orders related to any change in the condition of a resident. For example, "please watch Jane Doe particularly carefully," or "take John Jones' temperature in an hour." Finally, the nurses have the authority to determine when the aides may take their work breaks; but as a practical matter the aides usually work that out among themselves.

That does not equate to "responsibly . . . direct-[ing]" the aides "in the interest of the employer." Apart from the fact that the nurses' focus is on the well-being of the residents rather than of the employer, the direction the nurses give to the aides is closely akin to the kind of directing done by leadmen or straw bosses, persons who Congress plainly considered to be "employees." See, *e.g.*, *NLRB v. Res-Care, Inc.*, above.

Calling In Off-Duty Aides; Aides' Overtime; Aides Leaving Work Early

If an aide doesn't show up for work, the nurse on duty on the affected wing of the facility is authorized to and, indeed, is expected to, obtain a replacement.

One way the nurse does that is by telephoning off-duty aides and asking those aides if they want to work an extra shift or partial shift (generally at overtime pay rates). A list of Heartland's aides, with their telephone numbers, is posted at each of the nursing stations. The nurse on duty simply calls aides on the list until an aide is found who is willing to come in. There apparently is no pre-set order for calling the aides. So to that extent the nurse has some discretion in the matter. But the nurse has no authority to order an off-duty aide to come to work. And the record indicates that neither the nurses' superiors, nor the nurses themselves, nor the aides, consider that discretion on the nurses' part to be of any import.

The second way the duty nurse may attempt to deal with an aide's failure to show up for work is to ask the aides who are scheduled to go off duty if one of them is willing to remain at the facility, on overtime. (Nurses have no authority to require any aide to remain on duty past the aide's scheduled departure time.[6]) If more than one of the aides wants the overtime work, the nurse typically lets the aides de-

[6] It is thus not uncommon for all of the aides on duty to leave the facility at the end of a shift even though the following shift is going to be short-handed. By contrast, if the duty nurse's replacement fails to arrive, the duty nurse has to remain on duty until a replacement can be found.

cide among themselves which of them will remain at work.

The nurses otherwise have no authority to grant overtime. Thus the nurses are not authorized to deal with an unusually heavy workload by asking aides to work on an overtime basis.

Heartland's nurses have no authority to let an aide leave work early for personal reasons. But if an on-duty aide wants to leave early because she feels sick, she makes the request to the nurse. Since a sick aide obviously must be allowed to go home, however, that "request" is really more of a notification than an asking to be allowed to leave.

Nurses also perform various clerical-type functions related to aides arriving late or leaving early—such as initialling time cards when an aide has worked overtime and recording the fact of an aide's absence.

None of the nurses' functions relating to having aides work overtime, handling requests to leave early because of sickness, or the like, suggests supervisory authority on the nurses' part. In fact the limitations of the nurses' authority in this respect suggests employee status. See *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB No. 40 (Nov. 28, 1989); *Phelps Community Medical Center*, 295 NLRB No. 55 (June 15, 1989); compare *Beverly Manor Convalescent Centers*, 661 F.2d 1095, 1100 (6th Cir. 1981) (nurses who had authority "to adjust . . . employee schedules in accordance with the vagaries of manpower needs" may nonetheless be "employees" rather than "supervisors").

Calling In "Pool" Aides

Employment agencies are available that can on short notice supply an aide (or a nurse) to a nursing

home on a temporary basis. But the services of an aide from such a "pool" cost Heartland considerably more than the services of one of its own employee-aides. Heartland's nurses wanted the authority to call one of the pools when necessary to deal with shortages of aides on their shifts. But throughout the period under consideration here, the nurses' supervisors explicitly advised the nurses that they were not authorized to bring in any pool aides.

Rewarding/Promoting Aides

While in theory an aide's pay may vary depending upon his or her level of performance, in actuality the pay level of Heartland's aides depends solely on their seniority. All the aides do the same work. They have the same titles. Heartland never promotes its aides to a better job. So Section 2(11)'s "reward" and "promote" language is beside the point here.

Disciplining Aides; Discharging Aides

As touched on earlier, every Heartland nurse routinely speaks to an aide whenever the nurse sees the aide failing to perform a task or performing it improperly. But criticism of that sort does not affect the aides' careers at Heartland.

Heartland keeps a supply of "employee counseling forms" at both of the nurses' stations. The forms have spaces for the nurse on duty to describe the "problem," for the aide to make a "statement," for the nurse to describe the "resolution of problem or action taken," and for the nurse and the aide to sign the form. At her discretion a nurse may use a counseling form to raise with an aide problems such as the aide being "too bossy," improperly passing work off

onto other aides, not working fast enough, and "not positioning patients properly."

Nurses deliver completed counseling forms to Heartland's office where, as far as the nurses are concerned, the forms disappear. In fact Heartland retains the completed forms in the aides' personnel files. The record contains no indication that the counseling forms that the nurses drafted have ever had a deleterious impact on any aide.

In that regard I will assume that the General Counsel has the burden of proving that the nurses against whom HCR allegedly discriminated were "employees," and, therefore, not supervisors.[7] But here we are considering a subissue that ordinarily should be able to be easily resolved on the basis of records in the Respondent's possession. Given HCR's failure to produce any evidence that an aide's being the subject of counseling forms ever affected the aide's career with Heartland, I conclude that the nurses' role in completing counseling forms regarding aides' behavior is not an indication of supervisory authority.

Nurses routinely report problems about an aide's work or attendance to Heartland's administrator or D.O.N. Sometimes those reports have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in discharge. And sometimes the nurse sits in on the conference between the administrator or D.O.N. and the aide in which the aide is advised of that action. But the nurses themselves do not penalize any aide or threaten any aide with future penalties. And with

[7] See *Ohio Masonic Home*, 295 NLRB No. 44, slip op. at 10, fn. 7 (June 15, 1989).

only minor exception the nurses do not recommend that any aide be penalized.

The Heartland nurses have one other arguable connection to the supervision of the facility's aides: During some of the period at issue the nurses participated in "performance appraisals" of the aides.

Heartland's policy is to have a performance appraisal completed on each of its employees at the end of their probationary periods and at yearly intervals thereafter. At the start of the time period we are focusing on here the nurses did not have anything to do with the aides' performance appraisals. But beginning in February 1989, in the case of some aides, but by no means all, one of the nurses on whose shift the aide worked filled out much of the aide's performance appraisal form. (The marking choices were "excellent," "above standard," "standard," and "below standard." The areas covered were "human relations," "attitudes toward work," "personal appearance," "job capability," "development," and "patient care.") The nurses were told *not* to answer the forms' ultimate questions—about "overall evaluation" and whether or not to "recommend continued employment." After the nurses completed their parts of the forms they signed the forms as "evaluator," turned them in to one of their superiors and had no further relationship with the appraisals. Thus the nurses did not participate in the meeting between each aide and the administrator or D.O.N. at which the performance appraisal was discussed.

The record does not indicate whether a poor performance appraisal ever leads to the discharge of an aide, or to the threat of discharge. As with the counseling forms, it should have been an easy matter for

HCR to show that poor performance appraisals affect aides' jobs at Heartland. Since there was no such showing, I assume that the nurses' role in the performance appraisal process has no impact on the aides' jobs and that that role accordingly does not suggest supervisory status.

Indeed even if HCR had shown that it does fire aides who receive poor performance appraisals, the import of that in determining the nurses status would still be unclear. For one thing, the nurses performed the appraisals only during part of the relevant time period. For another, they did not perform appraisals on all aides even during that period. Thirdly, HCR made it clear that it did not want any recommendation from the nurses about the aides' "overall evaluation" or whether the aides should be retained as employees. And lastly, the nurses did not participate in the part of the process that had to have had the greatest impact on the aides—the meeting with the administrator or D.O.N. about the aide's performance.

I conclude that Heartland's nurses have no authority to "discipline" employees, to "discharge" them, or "effectively to recommend such action," as those terms as used in Section 2(11). See *Beverly Manor Convalescent Centers*, 661 F.2d 1095, 1100-01 (6th Cir. 1981); *Ohio Masonic Home*, above.

Presence Or Absence Of Senior Personnel

Heartland's administrator, its D.O.N., and its A.D.O.N. work daytime, weekday, hours. In the evenings and at night on weekdays, and all the time on weekends, the two nurses on duty are the senior personnel present at Heartland. That suggests supervisory status on the nurses' part. *E.g.*, *Emory Convalescent Home*, 260 NLRB 540 (1982); *Northwoods Manor, Inc.*, 260 NLRB 854 (1982). But it certainly does not compel the conclusion that the nurses are supervisors, particularly since the administrator and the D.O.N. are always on call, and since the nurses do in fact call the administrator and the D.O.N. at their homes when non-routine matters arise. See *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB No. 40, slip op. at 12 (Nov. 28, 1989); *Phelps Community Medical Center*, 295 NLRB No. 55 (June 15, 1989); compare *Northwoods Manor*, above (nurses never called the D.O.N. when the D.O.N. was off duty).

Ratio of Supervisors to Employees

As noted earlier, Heartland's nursing department includes the D.O.N. and the A.D.O.N. (both of whom are supervisors), about 10 nurses, and 50 to 55 aides. (For the purpose of this discussion I am excluding the patient assessment nurse and the treatment nurse.) Additionally, Heartland's administrator routinely involved herself in the direct supervision of personnel in the nursing department (including, for example, face-to-face discipline of aides). If the nurses are deemed supervisors, the department's ratio of employees to supervisors (including the administrator) is about 4:1. If the nurses are not categorized as supervisors then the ratio is about 20:1. Excluding the administrator from the count produces a 30:1 ratio. Worse yet, Heartland functioned without a D.O.N. between December 6, 1988 and February 6, 1989.

A 30:1 (or even a 20:1) ratio is so high that it points strongly in the direction of supervisory status

for the nurses. See *Children's Habilitation Center v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989); *Waverly-Cedar Falls*, above, slip op. at 11-12 (concluding that a ratio of 15:1 was "arguably unreasonabl[y]" large); *Phelps Community Medicial Center* (18:1 employee-supervisor ratio is "arguably unreasonable").

Other Matters

I have considered the nurses' role in grievance handling, the nature of the training that HCR gave them, their position descriptions, and the like. But none of those areas seem to me to be worth much weight in the determination of whether the nurses should be considered supervisors for purposes of Section 2(11).

Are Heartland's Nurses Supervisors—Conclusion

It is clear that in common parlance Heartland's nurses are "supervisors." They give orders (of certain kinds) to the aides, and the aides follow those orders. In a manner of speaking, certainly, the nurse on duty is in charge of a wing of the facility.

But Section 2(11)'s definition of supervisors is different from Webster's. And as I understand the meaning of that provision, Heartland's nurses were not supervisors during the period under consideration.

I'm greatly troubled by that 30:1 employee-supervisor ratio. But the employee-supervisor ratio is not a criterion written into Section 2(11). And analyzing the situation at Heartland on the basis of the criteria that are spelled out in Section 2(11), the nurses simply do not possess supervisory authority.

I have also tried to look at the situation as a whole to see whether a step-by-step analysis is misleading. But doing so makes it even clearer to me that Heartland does not endow its nurses with the kind of authority they have to have [sic] to be considered supervisors for purposes of the Act. Throughout the hearing I kept getting the impression that Heartland's administrator believed that the nurses' views about anything other than hands-on care of the residents were not worth considering. And as I view the evidence, it shows that the behavior of the administrator at Heartland repeatedly demonstrated that belief. It's true that the administrator and her superiors occasionally gave speeches and the like to the nurses that said "you are supervisors." But the actions of Heartland's administrator proclaimed in unmistakable fashion that, to HCR's management, Heartland's nurses were just hired hands.

II. *Did HCR Dismiss Cynthia Cordrey, Julia Goldsberry, Or Ruby Wells Because Of Their Protected Activities*

The context. The impression I got from the record as a whole is that Cynthia Cordrey and Ruby Wells are the kind of nurses one would want to have caring for oneself, one's relatives or one's friends. But I also got the impression that as Cordrey and Wells proceed through life: (1) at work they start from the point of view that their supervisors are incompetent and treat employees unfairly; and (2) they look for evidence that "proves" that that point of view is accurate, overlooking contrary facts. (As for Goldsberry, it seems likely to me that she is less prone to seeing life through lenses of that shape.)

At Heartland in late 1988 and early 1989, as it happens, there was evidence that supported Cordrey's and Wells' viewpoint about their supervisors.

For one thing, the facility was understaffed, particularly in respect to aides, and HCR wasnt' doing anything effective to remedy the problem.

For another, Heartland's administrator, Brenda Stabile, was relatively inexperienced and vastly overworked. (The extraordinarily low ratio of supervisors to employees in Heartland's nursing department has already been discussed, as has the two-month vacancy in the D.O.N. position. That had to have an impact on Stabile. Everyone connected with Heartland, particularly its nursing department, must have felt the effect of that situation.)

Third, Heartland was the kind of employer whose managers spoke frequently to employees about the importance of each employee being a part of the "team," when what they meant is "we want you to follow orders and to do so cheerfully."

Pharmacy matters. One of the management actions that most upset Cordrey, Goldsberry and Wells, along with most of the other Heartland nurses, was Heartland's switching of its pharmacy business from a pharmacy named "Village" to one called Beeber's."

Heartland's residents need medicine, sometimes routinely, sometimes to treat a medical emergency. For years Heartland had obtained the medicine from Village pharmacy, a mom-and-pop type operation in Urbana (where Heartland is located). Many of Heartland's nurses knew and liked Village's owner/pharmacist, Al Weber, and they particularly appreciated his willingness to quickly deliver emergency medication at any hour, even in the middle of the

night. Many Heartland residents, their physicians, and members of their families (who tended to live in or near Urbana, of course), also had long-standing, amicable relationships with Weber.

But not long after Stabile arrived at Heartland as its administrator (in July 1988), she concluded that Village had not been providing Heartland with various documentation that the State of Ohio required Heartland to have, that Village had not been fulfilling certain other state-mandated requirements, and that Village was not in a position to remedy those failings. Stabile apparently did not appreciate the strength of the relationships between the members of the Heartland community (employees, residents, residents' family members and physicians), on the one hand, and Village, on the other. So she decided to have Heartland use Beeber's, which is an "institutional" pharmacy located near Dayton (about 40 miles from Heartland). The switch became effective on December 1, 1988. As it turned out, the change had one further impact: it increased the amount of paperwork that Heartland required of its nurses.

Various Heartland residents, their families, and their physicians, responded with concern and, sometimes, anger, to the switch. Some of Heartland's nurses, including Cordrey and Wells, fed that concern and anger and, indeed, sometimes instigated it, by voicing their own concerns and anger about the change to those residents, families and physicians, and by saying that the change could impair the quality of the care that Heartland's residents received and might increase the cost of their medication. In part because of such comments by the Heartland nurses, Heartland's pharmacy change became the

talk of Urbana—and that talk was not kind to Heartland. That, in turn, resulted in a drop in the number of admissions into Heartland, to Heartland's financial detriment.

The period of this turmoil: from late autumn 1988 on into February 1989.

The Meeting In Toledo on January 11. On January 10 (1989) Cordrey, Goldsberry and Wells asked to meet with Stabile. They wanted to talk to her about various actions by Stabile (or failures on her part to act) that, they felt, were harmful to the residents and were making work more onerous for the nurses and aides. But Stabile said that she was too busy to meet with them just then, that they should make an appointment for later in the week.

The three nurses responded by travelling the next day (on their own time) to HCR's corporate headquarters in Toledo. They met with an HCR vice president, Bob Possanza, and with HCR's director of human resources for operations support, Jim Millspaugh. The three nurses voiced four concerns. One was that Heartland employed an insufficient number of aides and that Heartland's wage level for aides and lack of aggressiveness in recruiting aides ensured that the facility would continue to employ an insufficient number of aides. Another was that Heartland seemed to be allowing one aide to blatantly violate the facility's attendance rules which, in turn, embittered all the other aides. The third item the nurses complained about was the recent switch in the pharmacy that Heartland used. That switch, the nurses said, impaired the quality of the care that Heartland's residents were receiving. Lastly the three nurses spoke about the difficulties that Heartland's nurses had in communicating with Stabile.

All in all, Cordrey, Goldsberry and Wells made it clear that they considered Stabile to be mismanaging Heartland.

Once the nurses had had their say Possanza assured them that they would not be harassed because they brought their concerns to HCR's headquarters, that a corporate official—probably Millspaugh—would visit Heartland to look into their concerns, and that HCR would advise the three of the results of that investigation. And, indeed, over the next couple of months Millspaugh did look into the circumstances at Heartland.

Millspaugh's "Audit" of Heartland

Millspaugh's investigation had two major results.

One was that Heartland increased the pay of its aides, and hired more aides. Millspaugh determined, that is, that the three nurses' contentions about Heartland's employment of an insufficient number of aides was correct.

The other principal result of Millspaugh's investigation is that HCR fired Cordrey, Goldsberry and Wells.

Millspaugh's meeting with Heartland's department heads. Less than a week after Cordrey, Goldsberry and Wells journeyed to Toledo, Millspaugh met with the Heartland's department heads. (Stabile was not present.) By then Millspaugh had heard about high levels of tension and employee dissatisfaction within Heartland. As a group the department heads liked Stabile, they knew about the trip by the three nurses to Toledo, they assumed that the nurses had criticized Stabile's management of Heartland, and they assumed that Millspaugh might have

in mind removing Stabile as administrator of Heartland. They accordingly presented a paper to Millspaugh that stated their support for Stabile. Several department heads spoke in general terms about problems resulting from unprovoked hostility toward management on the part of some employees. During the discussion at least one department head specifically referred to "unprofessional" behavior by Cordrey, Goldsberry and Wells.

Millspaugh responded by asking each person at the meeting to list the names of anyone associated with Heartland whom he or she believed might be responsible for the tension in the facility, "people that were kind of maybe making it a little bit harder . . . to maintain that teamwork effort." When Millspaugh collected the papers, he found that Cordrey's and Wells' names were on every slip of paper, and Goldsberry's was on many. A few other employees were named, but not as often as any of those three.

That meeting was the turning point for Millspaugh's investigation. From then on Millspaugh went forward with the thought that Cordrey, Goldsberry and Wells probably had a major hand in the "negativism" (as he called it) that, Millspaugh believed, was damaging Heartland. If the department heads had not mentioned Cordrey, Wells or Goldsberry at that meeting in January, in fact, it is unlikely that any of the three would have been fired.

Millspaugh's discussions with Stabile. Neither Cordrey, Goldsberry nor Wells liked Stabile and, predictably, Stabile reciprocated those feelings. Millspaugh's investigation into Heartland's problems led him to discuss Heartland's situation with Stabile, of course, and she commented to Millspaugh about the

three nurses' lack of cooperation with management, referring particularly to the pharmacy change. "They were very vocal about not wanting the pharmacy change," Stabile said, and they complained to Stabile about the extra paperwork it meant for them.

Stabile also told Millspaugh that unnamed employees had committed various improprieties. For example Stabile told Millspaugh: that she had heard that some nurses had communicated inappropriatelly with residents and their families about the pharmacy change; that the daughter of an A-the pharmacy change; that the daughter of an A-wing resident (A wing is where Cordrey, Goldsberry and Wells worked) had told Stabile that she had heard that Heartland employed an insufficient number of aides; that some Heartland employees had started rumors about an illicit romance between Millspaugh and Stabile and about Heartland saving money by turning off the heat at night; and that on several occasions during the course of the shifts that "these ladies" worked, Stabile had gotten hate notes under her door. It was evident that Stabile believed that Cordrey, Goldsberry and Wells were at the bottom of all these events, and Millspaugh came away from the conversation assuming that Cordrey, Goldsberry and Wells were in fact the culprits.

Millspaugh's meetings with employees. As part of Millspaugh's "audit" of Heartland, in mid-January he met with the facility's employees, group by group (nurses, aides, and so on). It seemed to Millspaugh that there was a tenseness, a hostility toward management, among the aides that there wasn't among, say, the housekeeping personnel, and that among the aides that tenseness was most pronounced among the aides who worked the second shift (3:00 to 11:00

p.m.). Moreover those second shift aides complained about the pharmacy change, a change that, to Millspaugh, aides should not have cared about. There were, obviously, all sorts of possibilities why the second shift aides might have voiced the feelings they did. But given the information that Millspaugh had gotten from the department heads and from Stabile to the effect that Heartland's problems centered around Cordrey, Goldsberry and Wells, what Millspaugh heard from the aides sounded to him like additional evidence that Cordrey, Goldsberry and Wells were at the heart of the tension at the facility.

Other facets of Millspaugh's investigation. By mid-January Millspaugh clearly had, in his own mind, built a case against Cordrey, Goldsberry and Wells. He did not, however, take any action against them. Instead, he continued to look into Heartland's problems and to talk to persons associated with Heartland about those problems. He spoke individually with some of the department heads, with the facility's office staff, with ex-employees, and had further talks with Stabile. Either because of what they said or, just as often, what Millspaugh led himself to believe based on what they said, he concluded that: a local physician had stopped referring patients to Heartland because of what Cordrey, Goldsberry and Wells had been saying to him; Cordrey had an unusually bad attendance record, and Wells' was almost as bad; Cordrey and Wells without adequate excuse missed a mandatory instructional meeting; during a recent period Wells had made a "horrendous" number of medical documentation errors; Cordrey and Wells had been criticizing Heartland to the residents of the facility and out in the Urbana

community; the three kept talking about Stabile's unfairness; Cordrey and Wells had urged Heartland's medical director (who was not a Heartland employee) to question the pharmacy change; and Cordrey and Wells were "insubordinate," they were "used to getting their own way" and wanted to keep things that way.

The events of March 2. Millspaugh met with Heartland's nurses on March 2. His main purpose in calling the meeting was to discuss three topics: (1) Heartland was increasing the aides' pay and would be actively seeking to hire more aides; (2) Stabile would be staying on as administrator; and (3) Heartland was not going to switch back to Village pharmacy. Had the meeting been a relaxed, friendly one, that might have been the end of the matter. But it was not. In Millspaugh's words (which I credit):

> the demeanor and tone of the meeting . . . was one of resistance to change, emphatic refusal to get on board and make Heartland of Urbana a good facility . . . there was nothing showing me that there was going to be anything different from what it had been in the past.

Millspaugh had met with Cordrey, Goldsberry and Wells just prior to the March 2 nurses' meeting to tell them, in advance, what the nurses' meeting was going to be about. (Millspaugh did that because he was going to announce at the nurses' meeting the results of his investigation. Cordrey, Goldsberry and Wells were entitled to advance notice, Millspaugh felt, because the three were the ones who had brought about that investigation by their trip to headquarters on January 11). Two parts of the conversation at

this pre-meeting are worth noting. One is that Millspaugh said that he had heard a rumor that the nurses were planning a walk-out. But the rumor was entirely erroneous, the three nurses said so, and Millspaugh believed what they said. The other is that when Millspaugh said that Stabile would be staying on as administrator, he went on to say that Stabile had come to understand that, for Heartland to operate effectively, she had to work cooperatively with the nurses. Cordrey responded: "well, it hasn't helped."

Cordrey had made arrangements to leave before the end of the nurses' meeting. Millspaugh interrupted the meeting when Cordrey left, followed her out, and spoke privately with her for a few moments. The conversation went something like this:

Millspaugh: There are problems at Heartland, Cindy, and I think you're part of those problems. I'd like to see you become part of the solution.

Cordrey: Are you firing me?

Millspaugh: No. What I'm asking you to do is to become part of the team and to become part of the solution to the problems here.

Cordrey: I am not part of the problem.

Millspaugh: Cindy, you'd better think about getting another job—I think you should resign.

Millspaugh returned to the meeting; Cordrey left the building.

By March 2—actually, long before March 2—Millspaugh had concluded that Cordrey, Goldsberry and Wells were a central cause of the tension and morale problems at Heartland. To Millspaugh, therefore, the hostility he felt at his meeting with the

nurses, Cordrey's "well, it hasn't helped" remark about Stabile (during Millspaugh's pre-meeting conversation with the three nurses), and Cordrey's denial that she was a "part of the problem," were the last straws. He decided that HCR should fire Cordrey, Goldsberry and Wells.

HCR fires Cordrey, Goldsberry and Wells. In the days following March 2 Millspaugh told Possanza (the HCR vice-president), Stabile, and Stabile's immediate superior, that he though that Cordrey, Goldsberry and Wells should be fired. They all agreed. On March 14 Stabile told Cordrey and Wells that they either had to resign or they would be fired. They refused to resign and Stabile did fire them. On March 16 Stabile told Goldsberry the same thing. Goldsberry resigned.

Did HCR Fire Cordrey, Goldsberry And Wells Because Of Their Protected Activity

I consider the meeting that Cordrey, Goldsberry and Wells had in Toledo with Possanza and Millspaugh to be protected activity. But I am convinced that Millspaugh did not hold the three nurses' trip to Toledo against them. I make that finding even though Millspaugh's basis for firing Goldsberry and Wells is not wholly logical, based even on Millspaugh's own testimony. In particular, the final factor that led Millspaugh to urge that Cordrey, Goldsberry and Wells be fired was his private conversation with Cordrey. And neither Goldsberry nor Wells was mentioned in that conversation, or even referred to. Beyond that, as I read the record it should have been apparent to Millspaugh that Goldsberry had expressed considerably less hostility toward Heartland's management than had either Cordrey or Wells.

That suggests that Millspaugh, in his own mind, simply lumped together the activities of the three. Certainly one reason he might have done that was their joint trip to Toledo. But throughout Millspaugh's investigation, numerous people with whom he spoke referred to Cordrey, Goldsberry and Wells in one breath. The probability is that it was those conversations that led Millspaugh to think of the three nurses as a kind of single unit, not the nurses' trip to Toledo.

That, however, does not end the discussion about whether HCR fired the three nurses because of their meeting with HCR's management in Toledo or whether the nurses were discharged because of other protected activity.

The basis of criticisms of the three nurses by Heartland supervisors to Millspaugh. On a number occasions various Heartland supervisors spoke disparagingly of Cordrey, Goldsberry and Wells to Millspaugh. Absent that criticism of the three nurses by those supervisors, the three would not have been fired. That raises the question of whether the supervisors disparaged Cordrey, Goldsberry or Wells to Millspaugh because of the nurses' protected activity.[8]

Cordrey, Goldsberry and Wells on several occasions engaged in protected discussions among themselves and with other Heartland employees. They tried, concertedly, to meet with Stabile. And they did meet with Possanza and Millspaugh. But they also griped to Stabile and other supervisors in ways and about subjects that the Act does not protect, com-

[8] Some evidentiary questions inherent in that issue were discussed during the course of the hearing, at tr. 1560-63.

plained about Heartland to other employees with no thought of pursing concerted action, and complained about such matters as the pharmacy change and Heartland's employment of an insufficient number of aides to residents and to members of the residents' families.

As I evaluate the record, it is too sparse (notwithstanding its many exhibits and 1,800 pages of transcript) to permit me to determine whether the Heartland supervisors made those criticisms of Cordrey, Goldsberry and Wells to Millspaugh solely because of the three nurses' unprotected activity, or whether those criticisms stemmed partially from the nurses' protected activity.[9]

Meetings of employees called by management. Millspaugh twice called Heartland's nurses to meetings, the first time on January 18, the second on March 2.

At the January meeting various nurses complained about matters like the insufficient number of aides, the pharmacy change, and inadequate equipment. Those complaints amounted to protected activity. *Whittaker Corporation*, 289 NLRB No. 116 (July 18, 1988). But that meeting played no part in HCR's discharge of Cordrey, Goldsberry or Wells, and I will not consider it further.

[9] Cordrey, Goldsberry and Wells participated in employee activities that eventuated in the three carrying a letter critical of Heartland's management to the Department of Health of the State of Ohio. The A.D.O.N. was invited to join in those activities. But neither Millspaugh nor Stabile nor any other Heartland supervisor who participated in any way in the events leading to the discharges of Cordrey, Goldsberry or Wells ever learned of those activities.

Millspaugh's meeting with Heartland's nurses on March 2, his pre-meeting get-together with Cordrey, Goldsberry and Wells on that day, and his private discussion on that day with Cordrey have all been discussed as have my findings that Cordrey's criticism of Stabile at the pre-meeting and her "I am not part of the problem" statement played a role in Millspaugh's decision to fire Cordrey, Goldsberry and Wells. But I do not consider either of those two remarks to be protected by the Act.

A more difficult question is raised by the fact that Millspaugh based his decision to fire Cordrey, Goldsberry and Wells in part on the "demeanor" of the assembled nurses at the March 2 meeting. And by "demeanor" Millspaugh was referring to body posture (cross arms and legs, for example) and facial expressions (angry, irritated looks).

At the meeting Millspaugh told the nurses that the pharmacy change they did not like would remain in place, that Stabile would continue on as administrator, and that anyone who could not accept those decisions should leave Heartland. The demeanor of the nurses attending the meeting surely stemmed from those statements by Millspaugh and from the nurses' generalized disapproval of HCR's management of Heartland.

Had the nurses verbally expressed their opposition to Millspaugh, their statements probably would have been protected by the Act. See *Whittaker Corporation*, above; *The Hoytuck Corp.*, 285 NLRB 120, fn. 3 (1987). But it would be stretching things to conclude that the nurses' non-verbal expression was protected by the Act, particularly since there is no indication that the nurses intended that their body pos-

tures and facial expressions seen by Millspaugh as communication.

There is one last matter to consider regarding the discharges of Cordrey, Goldsberry and Wells. That is, the protected activity of Cordrey, Goldsberry and Wells in meeting with HCR's management in Toledo on January 11 led to their being fired.

Millspaugh undertook his investigation into Heartland's circumstances because of what Cordrey, Goldsberry and Wells said about Heartland at their meeting with management in Toledo. Absent that trip to Toledo by the nurses, that is to say, no such investigation would have been conducted. And it was Millspaugh's investigation of Heartland that resulted in Millspaugh's recommendation that HCR discharge the three. Had there been no investigation, Cordrey, Goldsberry and Wells might well still be working at Heartland.

Arguably, if the Board permits protected activity to have that kind of deleterious impact on employees, employees will feel less free to engage in protected activity. It seems to me, however, that there were too many links in the causal chain connecting the Toledo meeting with HCR's discharges of the three nurses for the Board to conclude that HCR fired the nurses "because" of their protected activity."

I accordingly conclude that the General Counsel has failed to prove that HCR discharged Cordrey, Goldsberry or Wells because of employee activity that the Act protects.

III. *The Written Warnings That HCR Issued To Cordrey, Wells And Thatcher*

On February 27 Stabile handed Cordrey three written warnings, and gave Wells four. Stabile gave two written warnings to nurse Connie Thatcher on February 23 and another on March 10. The General Counsel alleges that HCR issued all of those warnings because of the nurses' protected activity rather than for the reasons stated in the warnings. My conclusion is that HCR's issuance of warnings to Cordrey and Wells about missing an "inservice" did violate the Act, but that HCR's issuance of the other warnings did not.

The Warnings About Improper Documentation

Thatcher and Cordrey each received a notice of a "verbal warning" for having made 14 and 20 errors, respectively, in their January 1989 records of their treatment of residents. Wells received a "written warning" (which is more serious) for 44 such errors. In all three cases the warnings were dated February 15.

Much of Heartland's revenue comes from the State of Ohio and from the Federal government on behalf of individual residents, rather than from the residents themselves, as a result of Medicaid and Medicare reimbursements and the like. The State of Ohio, however, reduces such payments to the extent that the treatment that Heartland furnishes to any resident is not properly documented. At least in part because of that threat of reduced revenues, Heartland generally employs a "patient assessment" nurse (PAS nurse) whose sole job is to check the patient records written by Heartland's other nurses. When

Heartland's PAS nurse comes across a record that is inadequate or incorrect she either corrects it herself or tells the nurse who wrote the record to correct it.

On February 7, 1989, the State of Ohio notified Heartland that on the following day a State patient assessment team was going to audit Heartland's records for the months of November, December, and January. Heartland's management did not consider that to be wonderful news, particularly since during the latter part of that period Heartland had no D.O.N. and no PAS nurse. HCR responded by having five relatively senior personnel check Heartland's records, trying to find and correct errors in the too few hours available to them before the State's auditing team arrived. "Frantic" is the adjective that comes to mind.

Those HCR personnel began their review by examining the A wing's records. It turned out that they never did have time to get to B wing. And what they found in their search through A wing's records was an enormous number of errors by the nurses who worked on that wing.

Many of the errors were of the minor, technical, variety. And if those errors had come to management's attention in the normal course of events, little would have been said about them. But the circumstances here were not at all normal (given the State's audit), with the result that, because of those documentation errors, Stabile disciplined each of the A wing nurses. Some of the nurses (including Goldsberry) merely got a talking to. As indicated above, Cordrey, Thatcher and Wells got written disciplinary notices. They were the only nurses to receive such notices in the aftermath of the State's inspection.

In some respects Heartland behaved unfairly in handing out those written disciplinary notices. Heartland's nurses had come to expect that a PAS nurse would handle any errors that they might make; some of the errors were so technical that the nurses didn't consider them to be errors at all; and at the hearing neither Stabile nor Cooper (the D.O.N.) was able to convincingly explain why some nurses had gotten written disciplinary notices and some had not.

The General Counsel points to that unfairness and argues that it proves that HCR handed out those disciplinary notices for unlawful reasons. But my conclusion is that what it proves is that the episode was enormously unsettling to Stabile—it showed, after all, that there had been a serious management failure —and that it led her to lash out without fully thinking through what corrective action would be appropriate. It is worth noting, moreover, that Goldsberry, who in January had travelled to Toledo with Cordrey and Wells to complain about Stabile's management, did not receive a disciplinary notice about her errors; while Thatcher, who had not participated in that meeting, did.

HCR's Discipline Of Cordrey And Wells For Missing An "Inservice"

From time to time Heartland puts on training sessions for its nurses. Heartland calls those sessions "inservices." Some inservices are "mandatory," some are not. One of the aftermaths of the documentation problems unearthed in connection with the State's audit (as just discussed) was a mandatory inservice on documentation that Heartland held for its nurses on February 16.

Of Heartland's dozen or so nurses, only six attended the inservice. That led a number of HCR supervisors to conclude that at least some of the nurses who did not attend stayed away concertedly. ("Blue flu" was the term that the supervisors used among themselves in referring to the absences.)

Cordrey and Wells were among the nurses who did not attend. They received written disciplinary notices for their failure to attend. None of the other nurses who missed the meeting received any written discipline. (Goldsberry did not attend. But that was because she was on duty. Thus the fact that Heartland did not discipline Goldsberry for not attending the inservice is beside the point.)

Stabile's decision to issue disciplinary notices to Cordrey and Wells because of their failure to attend the inservice is peculiar in a number of respects.

The first is that Heartland failed to comply with its own policies in respect to the notice of the meeting that it gave to the nurses. That policy promises at least two weeks' notice of any mandatory inservice. Heartland gave the nurses only a few days' notice of the February 16 inservice.

Secondly, Cordrey was not on duty at Heartland at any time in the period between the announcement of the inservice and the inservice itself. Heartland's D.O.N. tried to telephone Cordrey to advise of the inservice but never reached her. So Cordrey was never officially notified of the inservice. (Cordrey did learn about it from other nurses, however.)

Thirdly, in advance of the inservice both Cordrey and Wells advised management that they could not attend it. Cordrey called the D.O.N. to say that her daughter was very sick and that the inservice con-

flicted with a doctor's appointment. Wells turned in a note the day before the inservice that advised that she "may not be able to attend meeting" because "sons both ill." In contrast, Thatcher, who was out sick, was not disciplined for failing to attend the in-service. Nor was nurse Karen Froebe, who had asked to be excused from the inservice in order to take her son to a dentist.

It seems to me that HCR's discipline of Cordrey and Wells for having missed the inservice was related to the supervisors' belief about the "blue flu." That is, I find that Stabile concluded that the reasons that Cordrey and Wells gave for missing the inservice were untrue, that the actual reason that they missed the inservice was to concertedly protest management's treatment of Heartland's nurses, and that that reason for missing the inservice did not amount to an acceptable excuse.

Cordrey and Wells, of course, deny that they engaged in any such protected activity. But that is immaterial. (In fact I need not, and am not going to, determine whether to credit their denials.) An employer violates the Act if it disciplines an employee because of its belief that the employer engaged in activity of the kind that the Act protects, whether or not the employer is correct in that belief. *Mashkin Freight Lines*, 261 NLRB 1473, 1476 (1982).

Here HCR did not discipline Cordrey and Wells for what HCR believed was their concerted activity. Rather, HCR disciplined Cordrey and Wells for their absence from the inservice on the ground that what Stabile believed to be their concerted protest was not a proper excuse for missing the meeting. But as far as the Act is concerned, that is a difference without

meaning. See, *e.g.*, *Go-Lightly Footwear*, 251 NLRB 42 (1980).

The more difficult question is whether this issue was litigated. In particular, the General Counsel's brief does not argue that HCR violated the Act in the manner I have just outlined.

But the complaint specifically alleges that HCR issued written warnings to Cordrey and Wells because they engaged in protected activity "and/or because Respondent believed they did so." (See, in regard to the relative importance of complaint and brief in delineating issues, *Louisiana-Pacific Corp.*, 299 NLRB No. 5 (July 13, 1990).) And the facts about management's belief about the "blue flu" are uncontested.[10]

I accordingly conclude that HCR violated Section 8(a)(1) of the Act when it concluded that Cordrey and Wells concertedly determined to miss the January 16 inservice as a protest of the management of Heartland and, because they missed the inservice, disciplined them.

I have considered whether the discipline HCR meted out to Cordrey and Wells regarding the inservice played any part in HCR's decision to fire the

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[10] I established a briefing schedule that that gave HCR an opportunity to file a reply brief (an opportunity that it utilized) because of my concern about the lack of clarity, as of the end of the hearing, about what protected activity the General Counsel was contending that Heartland's employees engaged in. But issues relating to management's beliefs about employee activities had no bearing on the discussion about briefing schedules. In any case, the General Counsel's brief (at page 17) does contend that HCR's supervisors "were somehow convinced that the nonattendance at the in-service training was . . . some sort of concerted action."

two nurses, or whether the belief on the part of HCR supervisors that Cordrey and Wells concertedly absented themselves from the inservice was a cause of their discharges. But I conclude that neither was the case. Or, in *Wright Line*'s terms,[11] I conclude that the record shows that HCR would have fired Cordrey and Wells even had HCR not held that belief and not disciplined the nurses for missing the inservice.

HCR's Discipline Of Thatcher Regarding Assignment Of Aides

On March 9 Heartland's D.O.N., Cooper, told the nurses that henceforth they would be required to assign aides to particular residents. Cooper described the criteria that she wanted the nurses to apply in drawing up the assignments. Thatcher had trouble that night in following Cooper's instructions. That, in turn, led to "turmoil" among the aides on Thatcher's shift. Cooper responded by disciplining Thatcher for not following Cooper's instructions.

That disciplinary action seems a bit abrupt, especially when compared to Heartland's usual disciplinary practices. But at the hearing I got the impression that Cooper is an abrupt kind of person. All in all, the record fails to indicate anything other than that the only reason that HCR issued Thatcher that March 10 disciplinary notice is the reason stated in the notice—"inappropriate" aide assignments.

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[11] *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

HCR's Discipline Of Cordrey, Thatcher And Wells For Excessive Absences

According to Hearland's "Absence Policy":

> The following occurrences may constitute excessive absenteeism. . . .
>
> (1) Two (2) absences in a month or 6 absences in a 12 month period.
>
> * * *

In Heartland's parlance, an "occurrence" is any day or consecutive group of days during which HCR would have scheduled the employee to work but for the absence, whether or not the absence was for a valid reason. Thus, for example, being out sick for two weeks in a row would constitute one occurrence.

At the start of the period of concern to us here, Heartland's supervisors routinely ignored that policy. But when Cooper arrived at Heartland, she re-implemented it. That led to Cordrey, Thatcher and Wells receiving disciplinary notices because of "excessive absences."

There were some anomalies in those disciplinary actions. (For example, one of Cordrey's "occurrences" as stated in her disciplinary notice was her absence when she attended the funeral of her father-in-law. Yet funeral leave is a specified HCR employee benefit.) But my conclusion is that the disciplinary notices that HCR issued to Cordrey, Thatcher and Wells for "excessive absences" were nothing more than that; they had nothing to do with the employees' protected activities.

Wells' Discipline For An "Unexcused Absence"

Stabile needed someone to work from 7:00 p.m. until 11:00 p.m. or midnight on February 3. On January 30 she talked to Wells about it. Wells agreed to work those hours, subject to certain pre-conditions being fulfilled by Stabile. Stabile agreed to those pre-conditions. But things went awry. Stabile may have misunderstood Wells when Wells described those pre-conditions. Or Stabile or Wells may have misremembered what the agreement was.

The result was that Stabile proceded to fulfill what she believed (rightly or wrongly) her agreement with Wells to be and counted on Wells to work on the night of February 3. But on the morning of February 3 Stabile got a note from Wells saying that since Stabile hadn't met the pre-conditions discussed on January 30, she was not going to work that night.

As far as Stabile was concerned, Wells had reneged, leaving Heartland in the lurch. Stabile accordingly disciplined Wells because Wells had not worked on a shift that she had "committed" to work, without an "acceptable excuse." Moreover Stabile treated Wells' failure to work on the evening of February 3 as an "absence." That led Stabile to issue a second disciplinary notice, this one for being absent too often (twice in one month—February 3 and on another date in February).

Wells was outraged. And it's easy to see why. But I find that Wells' protected activity had nothing to do with Stabile's disciplining of Wells.

Remedy

The recommended Order requires HCR to cease and desist from its unlawful actions and to take the usual affirmative action in remedying the unlawful action it did take, including removing from any files it may still keep on Cordrey and Wells any reference to its unlawful discipline of them.

ORDER [12]

The Respondent, Health Care and Retirement Corporation of America, Inc., d/b/a Heartland of Urbana, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Issuing disciplinary notices to employees because the employees, for purposes protected by Section 7 of the Act, concertedly refuse to attend a meeting called by HCR.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If HCR maintains any files pertaining to Cynthia Cordrey or Ruby Wells, remove from such files any reference to the disciplinary notices issued

[12] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

to Cordrey and Wells concerning their absence from an inservice on February 16, 1989, and notify Cordrey and Wells that this has been done and that the notices will not be used against them in any way.

(b) Post at its Urbana, Ohio, facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by HCR's representative, shall be posted by HCR immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. HCR shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps HCR has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismised insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 22, 1990

/s/ Stephen J. Gross
STEPHEN J. GROSS
Administrative Law Judge

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[13] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this Notice.

WE WILL NOT discipline you if, for reasons protected by Section 7 of the Act, you concertedly refuse to attend a meeting we have called.

WE WILL NOT in any like or related manner interfere with, restraint or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from any of our files that pertain to nurse Cynthia Cordrey or nurse Ruby Wells any reference to the disciplinary notices that we issued concerning their absence from an inservice, and we will notify Cordrey and Wells that this has been done and that the disciplinary notices will not be used against them in any way.

Health Care And Retirement
Corporation Of America, Inc.
d/b/a Heartland of Urbana

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, Ohio 45202-3271 Telephone (513) 684-3663.

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